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STATE SOVEREIGNTY AND THE DRAFTING OF THE CONSTITUTION – II

William P. Murphy

RECORDABILITY AND RECORD NOTICE OF UNACKNOWLEDGED FEDERAL OIL AND GAS LEASES, ASSIGNMENTS THEREOF AND ASSIGNMENTS OF INTEREST THEREIN

Jack H. Ewing

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December 1960

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STATE SOVEREIGNTY AND THE DRAFTING OF THE CONSTITUTION†

*William P. Murphy**

PROHIBITIONS ON THE STATES

As the preceding section demonstrated, the sovereignty of the states was diminished to a vast extent by the transfer to the national government of powers which had formerly been within the domain of the states. In addition, the Constitution placed substantial restrictions upon the political powers of the states which still further reduced the area of what had previously been unlimited sovereignty. Article VI of the Articles of Confederation had, of course, listed certain restrictions on the states, which had been ignored with impunity due to the lack under the Articles of any power of enforcement. All of the restrictions which were set forth in the Articles were carried forward into the Constitution. To these, however, the Founding Fathers made many additions which further impaired state sovereignty.

The original Virginia plan as introduced by Randolph had contained no specific limitations on the powers of the states. This did not represent any concession to state sovereignty, however, since under the Virginia plan Congress was to have not only an unlimited general legislative power but also the power to negative all state laws which, in the opinion of Congress, contravened the Constitution. With this power in Congress, there was no necessity for any specific limitations on the states. The correctness of this analysis is substantiated by subsequent events. The Convention finally, on July 17, over the strenuous protest of Madison and other advanced nationalists, rejected the Congressional negative. The resolutions referred to the Committee of Detail on July 26, however, still included the unlimited general legislative power. As has been seen, the Committee of Detail substituted for the general legislative power an extensive enumeration of express powers. It was in the draft Constitution

†This article continues a study which began with *State Sovereignty Prior to the Constitution*, 29 Miss. L.J. 115 (1958); continued with *State Sovereignty and the Founding Fathers*, 30 Miss. L.J. 135 (1959); 30 Miss. L.J. 261 (1959) and 31 Miss. L.J. 50 (1959); and continued with *State Sovereignty and the Drafting of the Constitution*, 31 Miss. L.J. 203 (1960). The footnote references are to FARRAND, THE RECORD OF THE FEDERAL CONVENTION (rev. ed. 1937) in four volumes.

*Professor of Law, University of Mississippi.

of the Committee of Detail that the listing of express limitations on the states first appeared. The reason would seem clear. With the Congressional negative and the general legislative power both eliminated, it was deemed necessary as a means of protecting the national government against intrusions by the states to expressly prohibit or limit the exercise of state power in certain areas.

Accordingly, two articles to accomplish this purpose were included in the committee draft, one article listing certain powers denied absolutely to the states, the other listing certain qualified prohibitions, that is, powers which were not to be exercisable by the states without the consent of Congress. This requirement of consent is readily seen as a method of protecting national interests. The Convention acted on these proposals in two ways, both of which reveal the general tenor of the proceedings and the attitude of the delegates toward state sovereignty. First, some of the qualified restrictions were elevated to absolute prohibitions, and second, new absolute prohibitions, not proposed by the Committee, were added by the Convention. As finally agreed to, the prohibitions on the states, absolute and qualified, appear in Article I, Section 10 of the Constitution. These prohibitions will be discussed in the order in which they appear.*

"No state shall enter into any treaty, alliance, or confederation. . . ." Under both the Articles of Confederation and the draft of the Committee of Detail, this was a qualified restriction only. It was placed in the category of absolute prohibitions by the Committee on Style — which means in practical terms, by Gouverneur Morris — on September 12, and as such approved by the Convention. It never occasioned any discussion nor was there any opposition. The threat to the national government would be obvious if such a power remained in the states. But the absolute prohibition serves also to make it manifest that the states were to be completely excluded from the areas of foreign affairs, and that the only sovereignty which could deal with other sovereign powers of the world was to be the national government.

"No state shall . . . grant letters of marque and reprisal." The Articles of Confederation had contained a qualified prohibition only in this regard; states were free to issue such letters under the Articles after a declaration of war by Congress. The proposal of the Committee on Style made this an absolute prohibition, applicable in peace as well as war. This prohibition must be considered along with the grant to Congress of the power to declare war. Letters of marque and reprisal were usually the prelude to, or the accompaniment of, hostilities between nations. No one state, therefore, could be permitted to excercise a power which might embroil the entire nation in a war. This denial of power to the states also serves to underscore the creation of a national

*The prohibitions taken from the Constitution are printed in italics.

sovereignty with exclusive powers over external affairs. It was accepted by the Convention without discussion and without opposition.

"No state shall coin money . . . ." Under the Articles of Confederation the power to coin money was concurrent with Congress and the States, the sole qualification on state power being that Congress could regulate the alloy and value of the state coin. But this supervisory authority could not eliminate variations in sizes and weights, and under the Articles, therefore, it was not possible to achieve a uniform national currency, the dire need of which has been discussed in a previous article. The Committee of Detail recommended an absolute prohibition on state power in this respect, which was adopted by the Convention without discussion and opposition. As earlier noted, Congress was granted the power "to coin money" and "regulate the value thereof." The addition of a prohibition on the states served to render this vitally important power of sovereignty exclusive with the national government.

"No state shall. . .emit bills of credit; make anything but gold and silver coin a tender in payment of debts." The Articles of Confederation had contained no limitations of this nature on the powers of the states. Indeed, as has been noted in a previous chapter, the issuance of paper money and the passage of tender laws by the states was viewed with special abhorrence by conservatives, since by and large they comprised the creditor class against whom the laws were directed. The draft of the Committee of Detail laid qualified prohibitions on these two powers. But the Convention went all the way. On August 28, when the article dealing with absolute prohibitions was taken up, Wilson and Sherman "moved to insert after the words 'coin money,' the words, 'nor emit bills of credit, nor make anything but gold and silver coin a tender in payment of debts'; making these prohibitions absolute, instead of making the measures allowable, as in the thirteenth article, with the consent of the legislature of the United States."[251] On this proposal Gorham was doubtful. He "thought the purpose would be as well secured by the provision of Article XIII, which makes the consent of the general legislature necessary; and that in that mode no opposition would be excited, whereas an absolute prohibition of paper money would rouse the most desperate opposition from its partisans."[252] Sherman, however, "thought this a favorable crisis for crushing paper money. If the consent of the legislature could authorize emission of it, the friends of paper money would make every exercise to get into the legislature in order to license it."[253] Rather than transfer the political struggle over paper money from the state legislature to Congress, the Convention voted eight states to one, with one state divided, in favor of an absolute prohibition against

251 2 Records 439.
252 2 Records 439.
253 2 Records 439.

state emission of bills of credit. The remaining part of the motion, relating to legal tender, was then passed without opposition. Thus at last the conservative nationalists incorporated long held desires into two very important restrictions on the sovereignty of the states.

"No state shall. . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." The Articles of Confederation had contained no such limitations. Nor were they included in the draft submitted by the Committee on Detail. On August 22, however, the Convention had agreed to prohibit Congress from passing bills of attainder and ex post facto laws. On August 28, just after the Convention had voted to prohibit the states from emitting bills of credit, King "moved to add, in words used in the ordinance of Congress establishing new states, a prohibition on the states to interfere in private contracts."[254] The reference was to the Northwest Ordinance, into which the Confederation Congress had written a prohibition against laws which interfered with or affected private contracts. Morris was opposed, asserting that "This would be going too far. There are a thousand laws relating to bringing actions, limitations of actions, etc., which affect contracts. The judicial power of the United States will be a protection in cases within their jurisdiction."[255] Madison was in favor of the motion, but thought a negative on state laws would be better. Mason objected that "This is carrying the restraint too far. Cases will happen that cannot be foreseen, where some kind of interference will be proper and essential. He mentioned the case of limiting the period for bringing actions on open account — that of bonds after a certain lapse of time — asking whether it was proper to tie the hands of the states from making provision in such cases."[256] Wilson's reply was that "The answer to these objections is that retrospective interferences only are to be prohibited."[257] To which Madison put the question, "Is not that already done by the prohibition of ex post facto laws, which will oblige the judges to declare interferences null and void?"[258] Madison thus indicated his view that the ex post facto prohibition was applicable to civil laws. At this point Rutledge moved, in lieu of King's motion, to insert "nor pass bills of attainder, nor retrospective laws," which motion carried, seven states to three.

On August 29, Dickinson "mentioned to the house that on examining Blackstone's Commentaries, he found that the term 'ex post facto' related to criminal cases only; that they would not consequently restrain the states from retrospectives laws in civil cases; and that some further provision for this purpose would be requisite."[259] Madison's notes reveal

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254 2 Records 439.
255 2 Records 439.
256 2 Records 440.
257 2 Records 440.
258 2 Records 440.
259 2 Records 448-9.

no discussion on this point. On September 14, Mason moved to strike from the limitations on the powers of Congress in Article I, Section 9, the prohibition against ex post facto laws. "He thought it not sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature; and no legislature ever did or can altogether avoid them in civil cases."[260] Gerry seconded the motion, "but with a view to extend the prohibition to 'civil cases,' which he thought ought to be done."[261] All the states voted no. On the same day, the first clause of Article I, Section 10 was approved in its final form. Thus, it is arguable as an original proposition whether the Convention intended the ex post facto and impairment prohibitions to be applicable to retroactive criminal and civil laws respectively, or whether ex post facto applied to both retroactive criminal and civil laws, thus giving the contract impairment clause a broader meaning. Whatever they intended, in either event the prohibitions made substantial inroads into what had previously been the sovereign powers of the states.

"No state shall . . . grant any title of nobility." The Articles had laid this prohibition on both Congress and the states. The Committee on Detail included a like provision in its draft. On August 23, the Convention adopted such a prohibition on Congress, and on August 28, the same as to the states. Such titles would, of course, have been completely inconsistent with republican principles.

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necesary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." The Articles of Confederation, in Article VI, had provided that no state should lay any imposts or duties which interfered with treaties entered into by Congress. This denial of power was effectually nullified in Article IX, however, by a proviso that Congress's power to enter into treaties should not restrain the power of the states to impose reciprocal imposts or to completely prohibit the exportation or importation of any species of goods or commodities whatsoever.

As has been noted, Congress was granted in the Constitution the power "to lay and collect taxes, duties, imposts, and excises," and also "to regulate commerce with foreign nations, and among the several states." In addition to clothing the national government with these great powers not possessed by Congress under the Articles, the Committee of Detail proposed a qualified limitation that no state, without the consent of Congress, should lay imposts or duties on imports. When this

[260] 2 Records 617.
[261] 2 Records 617.

provision came up for discussion on August 28, Madison moved to make the prohibition on the states an absolute one, but was voted down, seven states to four. On motion of King, the Convention did, however, extend the prohibition to exports as well as imports. Then, on Sherman's motion, the Convention voted, nine to two, that all proceeds of all state duties on imports and exports should be carried into the national treasury. The purpose was to prevent the Eastern states through whose ports goods must pass from unfairly taxing, to their own advantage, the producing states. On September 12, Mason brought the clause up for reconsideration, and urged a proviso that the states should be permitted to lay duties for the purpose of defraying the costs of state inspections. Madison agreed, pointing out that the "best guard against an abuse of the power of the states on this subject was the right in the general government to regulate trade between state and state."[262] Gorham and Langdon both thought "there would be no security, if the proviso should be agreed to, for the states exporting through other states, against these oppressions of the latter." They then inquired "How was redress to be obtained, in case duties should be laid beyond the purpose expressed?"[263] To which Madison made the extremely significant reply that "There will be the same security as in other cases. The jurisdiction of the Supreme Court must be the source of redress. So far provision had been made only against injurious acts of the states. His own opinion was that this was insufficient. A negative on the state laws alone could meet all the shapes which these could assume. But this had been overruled."[264] On September 15, Mason won his point, but the concession was restricted by the provision that "all such laws shall be subject to the revision and control of Congress."

In summary, the power of the states to lay duties was circumscribed in several ways. Such duties could be laid without the consent of Congress only for purposes of defraying inspection costs and even then only to the extent "absolutely necessary." In all other cases the consent of Congress was required. In all cases, whether with or without consent of Congress, the net produce of the duties was to go into the treasury of the United States, and all state laws were to be subject to revision and control of Congress. In this important area, therefore, the sovereign power which the states had enjoyed under the Articles was completely shackled under the Constitution.

"No state shall, without the consent of the Congress, lay any duties of tonnage." No such limitation existed under the Articles of Confederation, of course, and the Committee of Detail had made no recommendations in this regard. The provision was the result of a motion made on September 14 by McHenry and Carroll of Maryland that "no state shall be restrained from laying duties of tonnage for the

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262 2 Records 588-9.
263 2 Records 589.
264 2 Records 589.

purpose of clearing harbors and erecting lighthouses." In support, Mason explained that the reason was "the situation in the Chesapeake, which peculiarly required expenses of this sort."[265] An interesting colloquy then ensued. Morris averred that "The states are not restrained from laying tonnage, as the Constitution now stands. The exception proposed will imply the contrary, and will put the states in a worse condition than the gentleman wishes."[266] But Madison replied that "Whether the states are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague, but seem to exclude the power of the states. They may certainly be restrained by treaty. He observed that there were other objects for tonnage duties, as the support of seamen, etc. He was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority."[267] Sherman asserted that "The power of the United States to regulate trade being supreme can control interferences of the state regulations, when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction."[268] And Langdon then "insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it."[269] The motion was then changed to provide that "no state shall lay duty on tonnage without the consent of Congress," and in this form passed, six to four, with one state divided. It is clear, therefore, that Madison's view of the scope of Congress's commerce power was accepted by the majority.

"No state shall, without the consent of the Congress . . . keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." Comparable qualified prohibitions had existed under the Articles of Confederation, and had been carried forward, in much simplified form, into the draft of the Committee of Detail. These were approved by the Convention on August 28 without discussion or opposition, and agian, in final form, on September 14. In general, these limitations on the states had the same purpose and policy as the absolute prohibitions against the states entering into treaties, alliances, or confederations and granting letters of marque and reprisals; namely, to lodge the powers over foreign relations and war and peace in the national government. Special notice should be taken of the provision relating to agreements or compacts. It will be recalled that the prohibition against the states entering into any treaty, alliance or confederation was an abso-

265 2 Records 625.
266 2 Records 625.
267 2 Records 625.
268 2 Records 625.
269 2 Records 625.

lute one. The qualified prohibition refers to "any agreement or compact with another state, or with a foreign power. Neither the debates nor contemporary literature reveal exactly what difference the Founders had in mind between a "treaty, alliance or confederation" and an "agreement or compact." It may safely be assumed, however, that the separate phrases were not used without any purpose. Whatever the Framers had in mind, it is clear that the effect of the qualified prohibition, so far as concerned the power of the states to maintain relations with foreign nations, was to completely destroy what had previously been the area of state sovereignty. Furthermore, the extension of the prohibition from the external to the internal arena by the inclusion of the phrase "with another state" even further impaired the area within which the states were formerly free to move.

THE SUPREMACY OF NATIONAL LAW

The principal defect of the Articles of Confederation, the cumulative consequence of all of its provisions, was the weakness and inadequacy of the central government. This resulted partly from the distribution of power between Congress and the states. The powers delegated to Congress were too few and too narrow and the express reservation of power by the states in Article II precluded the existence of any implied national powers. As the two preceding sections have demonstrated, the Constitution remedied this aspect of weakness by vastly increasing the powers granted to Congress, by supplementing them with the "necessary and proper" power and by greatly increasing the express prohibitions on the power of the states. But insufficiency of powers in Congress was only part of the problem under the Articles. The other aspect was the lack of any means to enforce the Articles in the face of the failure and refusal of the states to abide by them. The Articles, after all, had granted some powers to Congress and denied some powers to the states. But if the states were unwilling to abide by even the modest provisions of the Articles, were they any more likely to abide by the much stronger provisions of the Constitution? Sovereign powers could be granted to the national government and denied to the states on paper, but unless there was some way to effectuate such provisions in practice, the Constitution would be as futile an instrument of government as its predecessor had been. Of equal, if not greater, importance, therefore, was the necessity of finding some means of enforcing whatever Constitution might be adopted.

Article XIII of the Articles had provided: "Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every state." This language clearly contemplated that central power and central law,

within their area of narrow and express authorization, would be complied with, as evidenced by the casting upon the states of a duty of obedience. The duty, however, was unenforceable. There was no method whereby such compliance could be achieved when it was not voluntarily forthcoming. This was entirely consistent with the true nature of the Articles, described in Article III as a "league of friendship," or, as described in this study, a "compact of sovereign states." As has been noted, the determination of the Founders was revealed at the very beginning of the Convention to abandon the confederation principle, in which the central authority operated on the states, and to adopt a national government whose powers would be excercised directly upon individuals. But the implication of this transformation on the problem of enforcing the supremacy of the central authority was not at first realized by the Convention. The sixth resolution of the Virginia plan, after granting a general indefinite legislative power to Congress, then granted the powers "to negative all laws passed by the several states, contravening in the opinion of the national legislature the Articles of Union or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the Articles thereof." The fourteenth resolution stated that the legislative, executive and judiciary powers within the several states ought to be bound by oath to support the Articles of Union.

Armed Force.

It is readily perceived that the use of force against a recalcitrant state is much more consistent with the idea of a confederation government acting on states in all instances than it is with the idea of a national government acting directly upon individuals. Furthermore, the use of physical coercion against states would be apt to keep the nation in a state of constant unrest and turmoil. It is probably no coincidence that Madison, the advanced nationalist, was the one to first realize these inconsistencies. On May 31, he "observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it, when applied to people collectively and not individually. A union of the states containing such an ingredient seemed to provide for its own destruction. The use of force against a state would look more like a declaration of war than an infliction of punishment; and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. He hoped that such a system would be framed as might render this recourse unnecessary, and moved that the clause be postponed."[270] On his motion, the clause was abandoned without further discussion and without dissent. The sixth resolution of the New Jersey plan, submitted to the Convention on June

[270] 1 Records 54.

15, contained a provision authorizing the executive to forcibly compel obedience to laws of Congress and treaties, but was never discussed or acted on. Another part of this sixth resolution, however, became exceedingly important, as will be seen.

The Congressional Negative.

At the same time that the Convention eliminated the power of coercion, the Convention approved on May 31 the other clause of the Virginia plan which authorized a Congressional negative over state laws which contravened "the Articles of Union, or any treaty subsisting under the authority of the Union." On June 8, Pinckney launched an effort to vastly expand this power by moving that "the national legislature should have authority to negative all laws which they should judge to be improper." This motion touched off a lively debate. Pinckney "urged that such a universality of the power was indispensably necessary to render it effectual; that the states must be kept in due subordination to the nation; that if the states were left to act of themselves in any case, it would be impossible to defend the national prerogatives, however extensive they might be on paper; that the acts of Congress had been defeated by this means; nor had foreign treaties escaped repeated violations; that this universal negative was in fact the cornerstone of an efficient national government; that under the British government, the negative of the Crown had been found beneficial, and the *states* are more one nation now than the colonies were then."[271]

As has been noted in a previous chapter, the Congressional negative was one of Madison's most cherished ambitions, and he continued to urge its adoption until the very end of the Convention. Now Madison seconded Pinckney's motion. "He could not but regard an indefinite power to negative legislative acts of the states as absolutely necessary to a perfect system. Experience had evinced a constant tendency in the states to encroach on the federal authority; to violate national treaties; to infringe the rights and interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischiefs. The existence of such a check would prevent attempts to commit them. Should no such precaution be engrafted, the only remedy would be in an appeal to coercion. . . .The negative would render the use of force unnecessary. The states could of themselves pass no operative act, any more than one branch of the legislature, where there are two branches, can proceed without the other. But in order to give the negative this efficacy, it must extend to all cases. A discrimination would only be a fresh source of contention between the two authorities. In a word, to recur to the illustrations borrowed from the planetary system, this prerogative of the general

[271] 1 Records 164.

govenment is the great pervading principle that must control the centrifugal tendency of the states which, without it, will continually fly out of their proper orbits, and destroy the order and harmony of the political system."[272]

In opposition to the motion, Williamson said he "was against giving a power that might restrain the states from regulating their internal police."[273] And Gerry said that he "Could not see the extent of such power, and was against every power that was not necessary. He thought a remonstrance against unreasonable acts of the states would restrain them. If it should not, force might be resorted to. He had no objection to authorize a negative to paper money and similar measures . . . . He observed that the proposed negative would extend to the regulations of the militia, a matter on which the existence of the state might depend. The national legislature, with such a power, may enslave the states. Such an idea as this will never be acceded to. It has never been suggested or conceived among the people. No spectacular projector — and there are enough of that character among us, in politics as well as in other things — has, in any pamphet or newspaper, thrown out the idea."[274] Sherman was for considering the matter further. He "thought the cases in which the negative ought to be exercised might be defined. He wished the point might not be decided till a trial at least should be made for that purpose."[275]

Wilson then joined in support of Pinckney and Madison. He "would not say what modifications of the proposed power might be practicable or expedient. But however novel it might appear, the principle of it, when viewed with a close and steady eye, is right. There is no instance in which the laws say that the individual should be bound in one case and at liberty to judge whether he will obey or disobey in another. The cases are parallel. Abuses of the power over the individual persons may happen as well as over the individual states. Federal liberty is to the states what civil liberty is to private individuals; and states are not more unwilling to purchase it, by the necessary concession of their political sovereignty, than the savage is to purchase civil liberty by the surrender of the personal sovereignty, which he enjoys in a state of nature. A definition of the cases in which the negative should be exercised is impracticable. A discretion must be left on one side or the other — will it not be most safely lodged on the side of the national government?"[276] Referring to the Articles of Confederation, Wilson noted that "To correct its vices is the business of this convention. One of its vices is the want of an effectual control in the whole over its parts. What

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[272] 1 Records 164-5.
[273] 1 Records 165.
[274] 1 Records 165-6.
[275] 1 Records 166.
[276] 1 Records 166.

danger is there that the whole will unnecessarily sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?"[277]

Dickinson also voiced his support. He said he "deemed it impossible to draw a line between the cases proper and improper for the exercise of the negative. We must take our choice of two things. We must either subject the states to the danger of being injured by the power of the national government, or the latter to the danger of being injured by that of the states. He thought the danger greater from the states. To leave the power doubtful would be opening another spring of discord, and he was for shutting as many of them as possible."[278]

Bedford, in opposition, emphasized the helpless position of the small states if the Congressional negative should be combined with representation based on population. "In answer to his colleague's question, where would be the danger to the states from this power, would refer him to the smallness of his own state, which may be injured at pleasure without redress. It was meant, he found, to strip the small states of their equal right of suffrage. In this case, Delaware would have about one-ninetieth for its share in the general councils, while Pennsylvania and Virginia would possess one-third of the whole. Is there no difference of interests, no rivalship of commerce, of manufactures? Will not these large states crush the small ones, whenever they stand in the way of their ambitions or interested views? . . .Besides, how can it be thought that the proposed negative can be exercised? Are the laws of the states to be suspended in the most urgent cases until they can be sent seven or eight hundred miles and undergo the deliberation of a body who may be incapable of judging of them? Is the national legislature, too, to sit continually in order to revise the laws of the states?"[279]

Madison spoke again. He "observed that the difficulties which had been stated were worthy of attention, and ought to be answered before the question was put. The case of laws of urgent necessity must be provided for by some emanation of the power from the national government into each state, so far as to give a temporary assent at least. This was the practice in the royal colonies before the Revolution, and would not have been inconvenient if the supreme power of negativing had been faithful to the American interest, and had possessed the necessary information. He supposed that the negative might be very properly lodged in the Senate alone, and that the more numerous and expensive branch therefore might not be obliged to sit constantly."[280] The last word was Butler's. He "was vehement against the negative in the proposed extent,

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[277] 1 Records 167.
[278] 1 Records 167.
[279] 1 Records 167-8.
[280] 1 Records 168.

as cutting off all hope of equal justice to the distant states. The people there would not, he was sure, give it a hearing."[281]

On the vote, the motion was defeated, seven states to three, with one state divided. With this broader version of the negative defeated, the scope of the Congressional negative which was included in the resolutions approved by the committee of the whole on June 19 remained in the form introduced in the Virginia plan and as formerly approved on May 31, that is, as applying to state laws which, in the opinion of Congress, contravened the Articles of Union or treaties subsisting thereunder. To even this relatively milder version, however, the few defenders of state sovereignty were naturally opposed. On June 16, Lansing had stated that "The states will never feel a sufficient confidence in a general government to give it a negative on their laws. The scheme is itself totally novel. There is no parallel to it to be found."[282] To which he added on June 20: "It is proposed that the general legislature shall have a negative on the laws of the states. Is it conceivable that there will be leisure for such a task? There will on the most moderate calculation be as many acts sent up from the states as there are days in the year. Will the members of the general legislature be competent judges? Will a gentlemen from Georgia be a judge of the expediency of a law which is to operate in New Hampshire? Such a negative would be more injurious than that of Great Britain heretofore was."[283] And Luther Martin, on June 27, asserted that "the states, particularly the smaller, would never allow a negative to be exercised over their laws."[284]

It will be recalled that by July 2 the Convention had reached an impasse, along large and small state lines, over the question of representation, as a result of which a committee was appointed which made its compromise report on July 5. The report was debated for ten days and finally adopted on July 16. It seems probable that the question of the negative was adding to the disgruntlement of the small states, for during this period of debate Randolph offered five resolutions for the purpose of concilating the small states. The fourth of these provided that "although every negative given to the law of a particular state shall prevent its operation, any state may appeal to the national judiciary against a negative; and that such negative if adjudged to be contrary to the power granted by the articles of the Union, shall be void." The proposal was never considered, and events revealed the reason. Not only had the small states succeeded in exacting equal representation in the Senate, which was approved on July 16, they had also set the Congressional negative up for the kill. It came the very next day, July, 17.

2811 Records 168.
2821 Records 250.
2831 Records 337.
2841 Records 438.

When the question came up on that day, it was Gouverneur Morris who "opposed this power as likely to be terrible to the states, and not necessary if sufficient legislative authority should be given to the government."[285] Now clearly Morris was no state sovereignty man; he was, in fact, one of the most advanced of the nationalists. Earlier on this very day he had opposed Sherman's amendment designed to protect state power from Congressional power and had stated that "The internal police, as it would be called and understood by the states, ought to be infringed in many cases."[286] The explanation of Morris's opposition lies in the latter part of his statement emphasizing a sufficient national legislative power. It has already been noted that the small state men abandoned their opposition to strong national powers once they were assured of equal representation in the Senate. The conclusion is clear that part of the deal also was the abandonment of the negative. Now Sherman supported Morris, saying that he "thought it unnecessary, as the courts of the states would not consider as valid any law contravening the authority of the Union, and which the [national] legislature would wish to be negatived."[287] And Martin "considered the power as improper and inadmissible. Shall all the laws of the states be sent up to the general legislature before they shall be permitted to operate?"[288]

Madison arose in defense of his brainchild. He "considered the negative on the laws of the states as essential to the efficacy and security of the general government. The necessity of a general government proceeds from the propensity of the states to pursue their particular interests in opposition to the general interest. This propensity will continue to disturb the system unless effectually controlled. Nothing short of a negative on their laws will control it. They will pass laws which will accomplish their injurious objects before they can be repealed by the general legislature, or set aside by the national tribunals. Confidence cannot be put in the state tribunals as guardians of the national authority and interests. In all the states, these are more or less dependent on the legislatures . . . . A power of negativing the improper laws of the states is at once the most mild and certain means of preserving the harmony of the system. . . . As to the sending all laws up to the national legislature, that might be rendered unnecessary by some emanation of the power into the states, so far at least as to give a temporary effect to laws of immediate necessity."[289]

Morris, however, "was more and more opposed to the negative. The proposal of it would disgust all the states. A law that ought to be negatived will be set aside in the judiciary department; and if that security

285 2 Records 27.
286 2 Records 26.
287 2 Records 27.
288 2 Records 27.
289 2 Records 27-8.

should fail, may be repealed by a national law."[290] This remark starkly reveals that it was not state sovereignty which lay behind the opposition to the negative. Although the power to negative was to be dropped, the power of Congress to repeal a state law was to remain, as well as the power of the national courts to invalidate it. It is obvious that Congressional power to repeal an operative state law and power in the national courts to invalidate it were as inconsistent with state sovereignty as the power to approve or disapprove before it could become operative. With the negative abandoned, the states would be more autonomous, but they would be no more sovereign. Sherman then added the thought that "Such a power involves a wrong principle, to wit, that a law of a state contrary to the Articles of the Union would, if not negatived, be valid and operative."[291] The principle of national supremacy, then, according to Sherman, would be enough to invalidate state laws contrary to the Constitution. Pinckney "urged the necessity of the negative,"[292] but it was defeated seven states to three. It is clear from the discussion which preceded the vote, however, that the result was not based on considerations of state sovereignty.

The Supremacy Clause.

Immediately after this vote the record reveals that Martin "moved the following resolution, 'That the legislative acts of the United States made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states, or their citizens and inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding.' "[293] This resolution, which was agreed to without discussion and without debate, was taken almost verbatim from the sixth resolution of the New Jersey plan, referred to previously. Martin, be it remembered, was a state sovereignty man — one of the few in the Convention — and the introduction of this resolution at this time was a shrewd maneuver on his part. The Convention was clearly in favor of the priniciple of national supremacy and was grappling with the problem of how the principle could best be effectuated. Coercion and the Congressional negative now had both been rejected. The supremacy clause as introduced by Martin was skillfully designed to give expression to the principle while at the same time leaving its effectuation where Martin desired it should be left, to the states.

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290 2 Records 28.
291 2 Records 28.
292 2 Records 28.
293 2 Records 28-9.

On closer examination, it is readily seen that, although the clause submitted by Martin was a considerable advance over the Articles, it did not provide for a complete national supremacy. For one thing, state laws were to be measured against only acts of Congress and treaties of the United States, and not against the Constitution itself. Put another way, in the absence of an affirmative exercise of national power, the Constitution alone would not be a soruce or standard by which invalidity of a state law could be determined. For another thing, it was only state "laws" which were to yield to national supremacy; state "constitutions" were to be superior. That this was Martin's intent is revealed in his later correspondence. Finally, even this limited degree of national supremacy was to be enforced by "the judiciaries of the several states ... in their decisions," thus leaving the ultimate power of interpretation and determination of conflict with state instrumentalities.

But these subtleties of drafting were not lost upon the nationalists, who were themselves adept at the art. The resolution as it came back from the Committee of Detail had undergone two significant alterations. The phrase "judiciaries of the several states" had been replaced by the phrase "judges in the several states." The importance of this change is realized when it is remembered that the Convention had on June 4 approved the power in Congress to create national tribunals inferior to the Supreme Court. On July 18, the day after his version of the supremacy clause was approved, Martin had sought unsuccessfully to eliminate this power to Congress. Under the Committee version, the federal judges sitting in the states would also be empowered to enforce national supremacy, instead of leaving it to the state judges. The second change of the Committee of Detail was equally important. The word "constitutions" was added to "laws" so that, as amended, national laws and treaties were to be given supremacy, "anything in the constitutions or laws of the several states to the contrary notwithstanding." The third deficiency in the Martin version was cured on August 23 when, on motion of Rutledge, the phrase "This Constitution" was added anterior to "laws of the United States." On August 25, the treaty clause was amended to read "all treaties made, or which shall be made," to make it sure that pre-existing as well as future treaties were contemplated.

In its final form, the supremacy clause is found in Article VI, Clause 2 of the Constitution and reads as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Here was the answer which the Convention had been seeking to the basic problem of how to effectuate national supremacy. The substitution of the supremacy clause

for the Congressional negative represented a shift from the idea of a prior legislative restraint on state law to the concept of a subsequent judicial review. Instead of considering national supremacy as a political matter to be dealt with by Congress, the Convention made it a legal principle enforceable in the courts, and this, of course, is more consistent with a national government operating upon individuals. While serving as a sufficient protection of national law against state interference, the supremacy clause provided for a minimum amount of direct control and review of state law. While it repudiated state sovereignty, it recognized a full degree of state autonomy. It is one of the ironies of the Convention that out of Luther Martin's effort to protect state soverignty there evolved what subsequent constitutional history proved to be the principal bulwark of national supremacy.

Oath of Support of Constitution.

In addition to the provisions already noted, the Virginia plan also sought to assure national supremacy by proposing, in its fourteenth resolution, "that the legislative, executive, and judiciary powers within the several states ought to be bound by oath to support the Articles of Union." When this resolution came up for discussion on June 11, Sherman "opposed it as unnecessarily intruding into the state jurisdictions."[294] Randolph replied that he "considered it necessary to prevent that competition between the national Constitution and laws, and those of the particular states, which had already been felt. The officers of the states are already under oath to the states. To preserve a due impartiality, they ought to be equally bound to the national government. The national authority needs every support we can give it. The executive and judiciary of the states, notwithstanding their nominal independence on the state legislatures, are in fact so dependent on them that unless they be brought under some tie to the national system, they will always lean too much to the state system, whenever a contest arises between the two."[295] Gerry "did not like the clause. He thought there was as much reason for requiring an oath of fidelity to the states from national officers as vice versa."[296] Luther Martin, whose primary loyalty was always with his state, "moved to strike out the words requiring such an oath from the state officers, viz., 'within the several states,' observing that if the new oath should be contrary to that already taken by them, it would be improper; if coincident, the oaths already taken will be sufficient."[297] This motion was defeated, seven to four, and the Virginia resolution was then adopted, six to five.

Unchanged by the Committee of Detail, the resolution came up on July 23, when Williamson suggested "that a reciprocal oath should be

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[294] 1 Records 203.
[295] 1 Records 203.
[296] 1 Records 203.
[297] 1 Records 203.

required from the national officers, to support the governments of the states."[298] This was the very thing which Gerry had suggested on June 11. Now Gerry inconsistently "moved to insert, as an amendment, that the oath of the officers of the national government also should extend to the support of the national government,"[299] which was agreed to without dissent. Wilson said "he was never fond of oaths, considering them as a left-handed security only. A good government did not need them, and a bad one could not or ought not to be supported."[300] He also thought the oath might "prove an obstacle" to the amending clause which had just been approved. Gorham "did not know that oaths would be of much use,"[301] but he saw no inconsistency between the oath and the provision for amendment. Gerry agreed with Gorham on this point and then added, "On the other side, he thought one good effect would be produced by it. Hitherto the officers of the two governments had considered them as distinct from, and not a part of, the general system, and had, in all cases on interference given a preference to the state governments. The proposed oath will cure that error."[302] The resolution was then agreed to without dissent. On August 30 the words "or affirmation" were added after "oath" so that in its final form in Article VI, clause 3 of the Consitution, it reads: "The senators and representatives before mentioned. and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution ...."

A NATIONAL EXECUTIVE

The lack of a unified executive was one of the conspicuous inadequacies of the governmental system prior to th Constitution. Not until 1781 did the Continental Congress agree to put the three departments of war, marine and treasury (which had theretofore operated as adjuncts to Congressional committees) under individual heads responsible to Congress. "Thus, almost when the war was coming to a close, Congress at last put its principal administrative and executive business upon such a basis as, if it had been done in the beginning of the contest, would have saved that devoted body from many blunders and would have proved of incalculable advantage in the conduct of its affairs."[303] The intentional exclusion from the Articles of Confederation of any provisions looking toward a permanent and potentially strong executive has been noted in a previous article.

In the light of this experience, it is not surprising that the seventh proposition of the Virginia plan was "that a national executive be insti-

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[298] 2 Records 87.
[299] 2 Records 87.
[300] 2 Records 87.
[301] 2 Records 87.
[302] 2 Records 88.
[303] BURNETT, THE CONTINENTAL CONGRESS 492 (1941).

tuted ... and that besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation." On June 1, the Convention unanimously approved the first part of this clause. On the same day Madison moved to strike the part relating to the powers of the executive and to insert instead the following: "with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers, not legislative nor judiciary in their nature, as may from time to time be delegated by the national legislature." On motion of Pinckney, the last words of Madison's clause were struck out, for the reason that "they were unnecessary, the object of them being included in the 'power to carry into effect the national laws.' "[304] On June 4, on motion of Wilson, the Convention voted in favor of a single executive. At the end of the first week, therefore, the Convention had resolved in favor of "a national executive, to consist of a single person, with power to carry into effect the national laws, to appoint to offices not otherwise provided for." Thus did the Convention, dominated entirely by nationalists of varying degree, at the very outset of its labor, provide a cure for one of the principal defects, as demonstrated by experience, of a system based on state sovereignty.

Method of Selection.

The method of selecting the executive proved to be one of the most troublesome questions which confronted the Convention. It is sufficient, for the limited purpose and context of this study, to note that the Convention emphatically rejected any method which would have placed the power of selection in the states. On June 1 Wilson "renewed his declarations in favor of an appointment by the people. He wished to derive not only both branches of the legislature from the people without the intervention of the state legislatures, but the executive also, in order to make them as independent as possible of each other, as well as of the states."[305] And on June 2 Wilson "repeated his arguments in favor of an election without the intervention of the states."[306]

On June 9, however, Gerry moved that "the national executive should be elected by the executives of the states...." In support of his motion, Gerry argued that the method of appointing by the state executives was "most analogous to the principle observed in electing the other branches of the national government; the first branch being chosen by the people of the states and the second by the legislatures of the states, he did not see any objection against letting the executive be appointed by the executives of the states."[307] Answer to this argument was given by

3041 Records 67.
3051 Records 69.
3061 Records 80.
3071 Records 175-6.

Randolph. He "urged strongly the inexpediency of Mr. Gerry's mode of appointing the national executive. The confidence of the people would not be secured by it to the national magistrate .... Bad appointments would be made, the executives of the states being little conversant with characters not within their own small spheres. The state executives too, notwithstanding their constitutional independence, being in fact dependent on the state legislatures, will generally be guided by the views of the latter, and prefer either favorites within the states, or such as it may be expected will be most partial to the interests of the state. A national executive thus chosen will not be likely to defend with becoming vigilance and firmness the national rights against state encroachments.... He could not suppose, either, that the executives would feel the interest in supporting the national executive which had been imagined. They will not cherish the great oak which is to reduce them to paltry shrubs."[308] On the question for referring the appointment of the national executive to the state executives, as proposed by Gerry, nine states were opposed, one was divided, and none were in favor.

Gerry brought his proposal up again later in the Convention. On July 19, he "urged the expediency of an appointment of the executive by electors to be chosen by the state executives. The people of the states will then choose the first branch; the legislatures of the states, the second branch of the national legislature; and the executives of the states, the national executives. This he thought would form a strong attachment in the states to the national system."[309] But the suggestion fell on deaf ears. On July 24 he moved "that the legislatures of the states should vote by ballot for the executive," but on a question to postpone a previous motion to take Gerry's motion under consideration, "The noes were so predominant that the states were not counted."[310] On July 25 Gerry once more proposed that "the executive be appointed by the governors and presidents of the states."[311] This time it was Madison who made the reply. In the course of a survey of the various methods of choosing the executive, Madison considered the possibility of choice by the states.

"The existing authorities in the states are the legislative, executive, and judiciary. The appointment of the national executive by the first was objectionable in many points of view, some of which had already been mentioned. He would mention one which of itself would decide his opinion. The legislatures of the states had betrayed a strong propensity to a variety of pernicious measures. One object of the national legislature was to control this propensity. One object of the national executive, so far as it would have a negative on the laws, was to control the national legislature, so far as it might be infected with a similar propensity. Refer

3081 Records 176.
3092 Records 57.
3102 Records 101.
3112 Records 109.

the appointment of the national executive to the state legislatures, and this controlling purpose may be defeated. The legislatures can and will act with some kind of regular plan, and will promote the appointment of a man who will not oppose himself to a favorite object. Should a majority of the legislatures, at the time of election, have the same object, or different objects of the same kind, the national executive would be rendered subservient to them. An appointment by the state executives was liable, among other objections, to this insuperable one, that being standing bodies, they could and would be courted, and intrigued with by the candidates, by their partisans, and by the ministers of foreign powers. The state judiciaries had not been, and he presumed would not be, proposed as a proper source of appointment."[312] On the same day that Madison made the above statements, Dickinson also stated that "insuperable objections lay against an election . . . by the legislatures or executives of the states."[313]

Representative of National Interests.

Throughout the Convention it was clear that the national executive was to be the representative of national rather than sectional interests, of the people rather than the states. More often than not this thought was implicit in the many discussions of the executive power, as a reading of the debates will demonstrate. Frequently, however, the thought was made explicit in the utterances of individual delegates. Butler, for example, on June 2, "contended strongly for a single magistrate, as most likely to answer the purpose of the remote parts. If one man should be appointed, he would be responsible to the whole, and he would be impartial to its interests. If three or more be taken from as many districts, there would be a constant struggle for local advantages."[314] On July 19, Gouverneur Morris stated in the course of a lengthy speech, that "Our country is an extensive one. We must either then renounce the blessings of the Union or provide an executive with sufficient vigor to pervade every part of it .... It is necessary, then, that the executive magistrate should be the guardian of the people .... The executive, therefore, ought to be so constituted as to be the great protector of the mass of the people .... If he is to be the guardian of the people, let him be appointed by the people ...."[315] On August 24, Madison declared that "the President is to act for the *people,* not for the *states.*"[316] And on September 6, Wilson, complaining of the excessive powers of the Senate as then provided, said that "According to the plan as it now stands, the President will not be the man of the people, as he ought to be ...."[317]

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312 2 Records 109-10.
313 2 Records 114.
314 1 Records 88-9.
315 2 Records 52-3.
316 2 Records 403.
317 2 Records 523.

In furtherance of this concept of the executive, the Convention also rejected proposals which would have made state and sectional interests part of the executive structure. It was realized that a single executive would be less susceptible to influence by such interests, as Butler's remark above indicates. The New Jersey plan would have created a plural executive, which would have been consistent with a confederation type government. The sentiment behind a plural executive was expressed by Williamson on July 24. "He did not like the unity in the executive. He had wished the executive power to be lodged in three men, taken from three districts, into which the states would be divided. As the executive is to have a kind of veto on the laws, and there is an essential difference of interest between the northern and southern states, particularly in the carrying trade, the power will be dangerous if the executive is to be taken from part of the Union to the part from which he is not taken."[318] No support was forthcoming, however, for this suggestion. On September 7, Mason moved to establish "an executive council as a Council of State for the President of the United States, to consist of six members, two of which from the eastern, two from the middle, and two from the southern states . . . ." This proposal, which would also have injected state and sectional interests into the executive structure, was defeated, eight states to three. All of which confirms the statement previously made that the states as such were to be represented in the national government only in the Senate.

Removal.

It is worth noting also that in the provision for removing the executive the Convention consciously avoided any participation by the states in the process. The Virginia plan contained no provision on this subject. The New Jersey plan, however, would have made the executive "removable by Congress on application by a majority of the executives of the several states." The Convention on June 2 voted in committee of the whole in favor of removability and approved this recommendation on July 20 but without specifying what body should impeach. The Committee of Detail gave this power to the House of Representatives, and this choice was approved by the Convention, and so it is provided in the Constitution, Article II, Section 6 and Article I, Section 2. Remembering that the House of Representatives was to be chosen by and be representative of the people, the vesting in this body of the power to impeach the executive is further evidence that the executive was intended by the Convention to be a national figure representing national interests.

Power of Appointment.

The course of proceedings with respect to the executive's power of

[318] 2 Records 100.

appointment should also be mentioned. In accordance with the decision of the Convention made on June 1, the Committee of Detail provided in its report that the executive should "appoint officers in all cases not otherwise provided for by this Constitution." On August 24 Randolph observed that "the power of appointments was a formidable one both in the executive and legislative hands; and suggested whether the legislature should not be left at liberty to refer appointments, in some cases, to some state authority."[319] Dickinson then moved to annex to the appointing power the clause "except where by law the appointment shall be vested in the legislatures of executives of the several states."[320] Sherman "objected to 'legislatures' in the motion, which was struck out by consent of the movers."[321] To the remainder of the motion Gouverneur Morris offered the observation that "This would be putting it in the power of the states to say, 'you shall be viceroys, but we will be viceroys over you.' "[322] On the vote, Dickinson's motion was defeated, thus conclusively manifesting the Convention's disapproval of any distribution between national and state authority of the power to appoint national officers.

The power of appointment of ambassadors and judges of the Supreme Court, as well as the power to make treaties, were cases especially provided for, and in the report of the Committee of Detail these powers were vested in the Senate. Considerable opposition was expressed. Madison, for example, stated that "the Senate represented the states alone: and that for this as well as other obvious reasons, it was proper that the President should be an agent in treaties."[323] The clause was never approved, and was referred on August 31, with other matters, to a committee on unfinished business. This committee on September 4 recommended the scheme finally approved, under which the powers were vested in the President, subject to the consent of the Senate. This action of the Convention thus represented a shift of power from the representative of the states to the representative of the people. It also affords further evidence of the contemplated role of the Senate as the voice of the states in a national government exercising supreme powers over no longer sovereign states.

[EDITOR'S NOTE: This article will be continued in the March 1961 issue of the *Mississippi Law Journal.*]

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319 2 Records 405.
320 2 Records 406.
321 2 Records 406.
322 2 Records 406.
323 2 Records 392.

RECORDABILITY AND RECORD NOTICE OF UNACKNOWLEDGED FEDERAL OIL AND GAS LEASES, ASSIGNMENTS THEREOF AND ASSIGNMENTS OF INTEREST THEREIN

*Jack H. Ewing**

It is common knowledge that federal oil and gas leases are not acknowledged, but it is common practice for the chancery clerks of this state to accept the same for record. Quite frequently assignments of such leases or of interests therein, though also unacknowledged, are likewise admitted to record. Does the recording of such unacknowledged leases or unacknowledged assignments impart constructive notice to subsequent purchasers for value? If not, are the records of the United States Bureau of Land Management at Washington of themselves sufficient in law to constitute constructive notice to subsequent purchasers for value without regard for requirements of state recording statutes?

These questions are of concern to the title attorney because the United States owns considerable acreage in the State of Mississippi and follows a somewhat liberal policy of leasing the same for oil and gas development.

The authority to lease most public land for oil and gas development originated with the Mineral Leasing Act of 1920.[1] Congress has amended and extended this Act from time to time, but it still remains the basic authority for the issuance of oil and gas leases upon most of the public domain, including all that part which is of interest to us as Mississippians. Under this legislation such land is leased by the Department of the Interior, acting through the Bureau of Land Management, pursuant to applicable law and regulations. A very full and comprehensive treatment of the subject of oil and gas leases on federal lands was prepared and published in 1951 by Ross L. Malone, Jr., of Roswell, New Mexico, who subsequently served and only recently retired as the distinguished President of the American Bar Association.[2]

The Bureau of Land Management has prepared and utilizes its own form for an oil and gas lease and has prepared and made available to others a form for lease assignment which is acceptable to it. Neither form includes any certificates of, or makes any provision for, acknowledgment. This omission appears to have created a general impression that ac-

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[1] 41 Stat. 437 (1920), 30 U.S.C. § 181 (1958).

[2] SOUTHWESTERN LEGAL FOUNDATION INSTITUTE ON OIL AND GAS LAW AND TAXATION 309-50 (1951).

knowledgment is not necessary to the effectual recordation of the lease or assignment in the county where the leased land is situated.

A very fine and thorough article upon this subject was written by Thomas J. Files, Division Attorney, Rocky Mountain Division, Pan American Petroleum Corporation, Casper, Wyoming, entitled "Recording of Instruments Affecting Oil and Gas Interests in Federal Lands."[3] With the express permission of Mr. Files, this writer has drawn rather freely from that article.

NECESSITY OF LOCAL RECORDATION

Originally, with our English forebears, a transfer of title resulted merely from a ceremony consisting of symbolic delivery of the land itself by the parties going upon the land and the grantor, or "feffor," giving to the grantee, or "feofee," a stick, twig, piece of turf, or handful of earth taken from the land, or some other token as a symbol of delivery. Estates less than freehold were transferred by mere entry of the new owner. A writing was not legally required until the Statute of Frauds was enacted in 1677.[4]

Since the earliest days of our statehood, Mississippi law, now Section 832 of the *Mississippi Code* of 1942, has required that a conveyance of land be in writing, signed and delivered by the grantor. It is elementary that such conveyance is valid between the parties without being made a matter of public record.[5]

Under the common law, deeds were not recorded and there was no such legal concept as constructive notice from public records.

> The recording of deeds and other instruments affecting the title to land is purely a system of legal institution, and not of common right or abstract justice . . . . At an early date in this history, however, to obviate frauds arising out of secret conveyances, statutes were enacted in the several jurisdictions requiring registration of conveyances in order to render them valid as against subsequent bona fide purchasers..... It is hardly necessary to point out that under the system of recording land titles which has grown up in the United States, it is practically essential to the security of ownership in real property that there exist some method by which the title can be made clear of record. Without regard to the effect of duly recorded instruments as constructive notice, the recording of titles has become so thoroughly imbedded in our system of dealing with lands that a title which cannot be traced and established by some form of public record is practically unmerchantable.[6]

Constructive notice from records is a creation of statute. In the ab-

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[3]ROCKY MOUNTAIN MINERAL LAW INSTITUTE 553 (1957).

[4]PATTON, TITLES § 3 (2d ed. 1957).

[5]Kelly v. Wilson, 204 Miss. 56, 36 So. 2d 817 (1948).

[6]45 AM. JUR. *Records and Recording Laws* § 28 (1959).

sence of statutory provision, public records carry no notice to the public. For a paper to be a public record is one thing, but for it to give notice to the world is another.[7] Where there is no statute providing for the registration of an instrument, the failure to record the same will create no equity in favor of a subsequent purchaser.[8]

Section 856, *Mississippi Code* of 1942, reads as follows:

> A written instrument of or concerning the sale of lands whether the same be made for passing an estate of freehold or inheritance, or for a term of years, or for any other purpose except in cases specially provided for by law, or any writing conveying personal estate, shall not be admitted to record in the clerk's office unless the execution thereof be first acknowledged or proved, and the acknowledgment or proof duly certified by an officer competent to take the same in the manner directed by this chapter; and any such instrument which is admitted to record without such acknowledgment or proof shall not be notice to creditors or subsequent purchasers for a valuable consideration.

It is well established that under our law the interest conveyed by an oil and gas lease is a determinable fee and therefore an interest in land.[9] An oil and gas lease thus comes within the requirement of the statute that recordation thereof is necessary to constitute notice.

The statute requires an instrument pertaining to land to be acknowledged or proved if it is to be admitted to record. Section 858 of the *Mississippi Code* provides forms of acknowledgment which may be used. One of the forms is in the nature of an affidavit to be made by a subscribing witness. When this form is used we refer to the instrument as having been proved as distinguished from its having been acknowledged in conventional form. When this writer refers to acknowledgment of an instrument, his reference is meant to cover both the conventional acknowledgment and the proof consisting of affidavit of subscribing witness.

Whatever form is used, the acknowledgment must substantially conform to the requirements of the statute. An acknowledgment which fails to do so is fatally defective and the deed is not constructive notice to subsequent purchasers.[10] Registration without attempt at acknowledgment is a mere nullity.[11]

It will be noted that Section 856 of the *Code* requires acknowledgment "except in cases specially provided for by law." We do not

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[7]Lyon v. Davis, 95 F.2d 103, 106 (D.C. Cir. 1938).

[8]Martin v. Nash, 31 Miss. 324 (1856).

[9]Dougherty v. Greene, 204 Miss. 56, 67 So. 2d 297 (1953).

[10]Smith v. McIntosh, 176 Miss. 725, 170 So. 303 (1936); Tinnin v. Brown, 98 Miss. 378, 53 So. 780 (1910).

[11]Work v. Harper, 24 Miss. 517 (1852).

find that any statute of this state excepts, expressly or by implication, an oil and gas lease upon federal or an assignment of the same from the operation of this requirement.

Section 866 of the *Code* reads as follows:

> All patents issued in the name of the United States or of this state for lands, may, whether acknowledged or not, be recorded in the office of the clerk of the chancery court of the county in which the land embraced in the patent may lie.

It might be argued that the word "patents," as used in this statute, embraces *any* instrument executed by the United States which pertains to land. The Mississippi Supreme Court has held that a power to sell a fee ordinarily includes the power to sell a lesser estate or interest, or to grant an easement. In *Thornhill v. Ford*,[12] the issue was whether a county board of supervisors, having authority to sell land, was required to sell the entire fee or could sell the land with a reservation to the county of a mineral interest in the land. In deciding that if the board could sell the fee, it could sell a component thereof, the court followed the general rule.[13] Under such rule there is the possibility that the court might reason that since by "patent" the United States could and does convey the fee itself, an instrument conveying an interest in the fee could logically be termed a "patent." While such holding would achieve a desired result, this construction of the statute would be extremely strained. The statute first appeared in the *Mississippi Code* of 1857,[14] two years before oil was discovered and at a time when it would be absurd to say that any member of the legislature had any inkling that there would ever be any such instrument as an oil and gas lease. Moreover, as applied to land, the word "patent" has been many times defined, but always as a land grant, a deed of the government, the instrument by which the government passes its title, an instrument by which the government quitclaims its interest, or the like, and never to designate or embrace an oil and gas lease.[15] There is only one definition of the word that contains any reference to mineral, and it defines a patent as including an instrument by which the United States conveyed the fee simple title to a mining claim.[16]

Existing regulations require that the lease or the assignment of any interest therein be filed with the Bureau of Land Management within ninety days from the date of its final execution, to be subject to the approval of the Secretary of Interior acting through the Bureau.[17] Orig-

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[12]213 Miss. 49, 56 So. 2d 23 (1952).

[13]72 C.J.S. *Powers* § 25 (1951).

[14]Chapter 61, Article 231.

[15]31A WORDS AND PHRASES, 124-25 (1957).

[16]Creede & C.C. Min. & Mill Co. v. Uinta Tunnel Min. & Transp. Co., 196 U.S. 337 (1905).

[17]43 C.F.R., § 192.141 (1954).

inally the Secretary had the authority to approve or disapprove at his discretion, but under the Act of August 8, 1946, he can now disapprove only for lack of qualifications of the assignee or lack of sufficient bond.[18] The approval of the Secretary is ordinarily evidenced by the Secretary's endorsement upon the face of the assignment. Such endorsement is neither witnessed nor acknowledged. This is immaterial if the assignment is acknowledged by the assignor, but generally, or at least not infrequently, there is no such acknowledgment. While, as heretofore pointed out, this failure to acknowledge apparently results from the use of the government form for assignment which makes no provision for acknowledgment, it often doubtless results because those dealing with government leases and assignments thereof, or of interests therein, appear to feel that, because public land is involved, there is a peculiar sanctity attached to such leases and assignments which immunizes them from the requirements of the law governing private parties. Apparently, the signature of an officer or functionary of the government on the lease or assignment is deemed by the parties dealing with leaseholds upon public land an excuse from any responsibility to see that such instruments are recordable. Indeed, there are some companies and individuals with years of experience in the oil and gas business who do not bother to tender such instruments to the desk for recordation. The basis of such dereliction appears to be an assumption that the United States would not issue conflicting leases or approve conflicting assignments. There are cases which suggest that this might be a false assumption.

No basis can be found for a distinction between unacknowledged assignments of private leases and unacknowledged assignments of government leases, although the latter bear endorsement of approval by the Secretary of the Interior, acting through the Bureau of Land Management. Certainly an unacknowledged assignment by an individual of a government lease bearing the approval of the Secretary cannot be said to come within the meaning of the word "patent" as used in Section 866 of the *Code*, even if it should be held that the government lease itself is in the nature of a patent.

This writer is of the opinion that an unacknowledged lease upon government land, or an unacknowledged assignment thereof or of an interest therein is not entitled to be recorded in the land records of the county where the land lies. And, if accepted and recorded by the clerk, the recordation does not constitute constructive notice to subsequent purchasers for value. Even if an assignment were properly approved by the Bureau and acknowledged by the assignor, this would not constitute constructive notice if the unacknowledged lease, although of record, was

[18] 60 Stat. 955 (1946), 30 U.S.C. § 187 (1958).

itself not recordable. There would be a break in the chain of title from the United States, as record owner of an unleased fee, to the assignor of a lease, and a subsequent lessee would not be charged with notice. The purchaser of the legal title to land is not required to take notice of a registered lien or encumbrance created by any person other than those through whom he is compelled to deraign his title. A recorded deed of trust made to a third person by the grantee in an outstanding unrecorded deed is not notice to, and does not put on inquiry, a subsequent purchaser from the same record owner.[19] The same principle would apply to a deed, a lease or an assignment.

Of course in Mississippi the question of whether there is constructive notice arising from the record is academic where the grantee or lessee is actually in possession, since possession under an unrecorded or improperly recorded deed or lease is in itself notice to subsequent purchasers.[20]

EFFICACY OF RECORDS OF BUREAU OF LAND MANAGEMENT

Full and complete records of issuance of oil and gas leases and of approval of assignments thereof or of interests therein are kept by the Bureau of Land Management. An interesting article, entitled "Examination of Federal Records Relating to Oil and Gas Rights and Records,"[21] was written sometime ago by Earl J. Thomas, Associate Director of the United States Bureau of Land Management. He discusses in detail how an application for an oil and gas lease or for an approval of assignment thereof is processed and recorded. The government maintains regional or district land offices, with their own records, in certain sections of the country, particularly the West; but these are of no concern to us since no such office is maintained or considered necessary for Mississippi. We go directly to the Bureau of Land Management for information respecting the public land within our state. The records of the Bureau are available to those having cause to use them. There are attorneys in Washington who make a specialty of furnishing information from such records. Such information can usually be obtained directly from the Bureau, but it has been found that the employment of a Washington attorney who can immediately go to the records affords such information without the delay incident to the orderly routine of the Bureau.

In the matter of federal oil and gas transactions involving public land, can it be said that the records of the Bureau of Land Management

[19]Turner v. Bell, 143 Miss. 782, 109 So. 794 (1926); Hart v. Gardner, 81 Miss. 650, 33 So. 442 (1903); Baker v. Griffin, 50 Miss. 158 (1874).

[20]See Gulf Refining Co. v. Travis, 201 Miss. 336, 29 So. 2d 100, 30 So. 2d 398, (1947).

[21]ROCKY MOUNTAIN MINERAL LAW INSTITUTE 361-378 (1957).

are sufficient unto themselves to constitute notice and to dispense with the necessity of observing the requirements of our state law? This writer thinks not.

It is true that state statutes affecting rights in the public domain must be construed in subordination to federal laws.[22] Thus, if the United States had legislated that the records of the Bureau of Land Management should constitute notice to the world as to the status of title to government land, this legislation would supersede conflicting state law. However, no federal statute is found which provides that the record of instruments affecting oil and gas and public land in the Bureau of Land Management is constructive notice. In fact, the Mineral Leasing Act of February 25, 1920, as now amended and extended, expressly provides that nothing therein shall be construed or held to affect the rights of the states to exercise any rights which they have with respect to federal leases.[23]

Department rules and regulations are to be given the effect of statutes when not inconsistent with law.[24] However, if the rules and regulations of the Bureau of Land Management were to be construed as constructive notice, they would be inconsistent with the state recording acts and with the avowed declaration of federation law that the states should retain all rights they have concerning leases upon public land.

Recording systems are creations of the state. Each state has its own system. Matters or recordation and notice arising therefrom are governed by the law of the state in which the land lies, and in this writer's opinion, this principle applies to federal leases and assignments thereof or of rights therein.

We find in *Corpus Juris Secundum* the following statement: "The state laws usually allow and encourage the recording of United States patents in the local offices for recording deeds and other instruments affecting real property, but the validity or operation of a government patent is not impaired by neglecting to record it in the local office."[25]

This same principle is stated as follows in Patton's *Titles*:

> The acts of Congress, also the patents, approved lists and certificates by which many grants are carried into effect, are of themselves "public records." A local record of them is therefore as unnecessary as it is ineffective to afford notice, determine priority, or to constitute evidence of title. However, since the term "record title" undoubtedly refers to a title shown by local records, it is both permissible and customary that these instruments, or certified copies thereof, should be recorded in the county where the land is situated. These records are given the

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22*E.g.*, Norris v. United Mineral Prods. Co., 61 Wyo. 386, 158 P.2d 679 (1945).

2341 Stat. 450 (1920), 30 U.S.C. § 189 (1958).

24Hodgson v. Midwest Oil Co., 17 F.2d 71 (8th Cir. 1927).

2573 C.J.S. *Public Lands* § 192 (1951).

> same effect as evidence as the records of other conveyances. It is, however, quite generally held that conveyances made by the patentee after he acquires an equitable interest by reason of a right to a patent are within the terms of the recording acts to the same extent as conveyances made by him after he acquires a legal title by issuance of the patent.
>
> As to state patents also, in the absence of provisions including them in the recording acts, they are not affected by these statutes, and registry in the state land office records is sufficient. However, in most states, the laws not only permit recording, as in the case of federal patents, but require that state patents, certificates of sale, and assignments of the latter be recorded the same as deeds, with like results to parties whose rights are based upon unrecorded instruments.[26]

We have no quarrel with either statement. It simply says that a patent is valid without recordation, which is true as to any instrument conveying legal title, and what it is discussing is original title, or the original divestiture of the United States of title, and not notice.

It is a general rule of law that all persons must take notice of the public laws by which they are governed, and hence all persons interested in transactions made pursuant to a public statute are chargeable with notice of all that the law contains. However, third persons are not chargeable with constructive notice of facts contained in public documents merely because they were the acts of authorized agents of the government, and mere official files, in the absence of a statutory provision, carry no notice to the public.[27]

It would appear that the records of the Bureau of Land Management respecting oil and gas leases and assignments thereof and of interests therein are maintained for the effective and efficient management of federally owned lands and resources. These records are designed to protect the respective rights of the government and individuals, and not to establish priority of rights between individuals resulting from conflicting conveyances. Under Sections 867-69 of the *Mississippi Code* of 1942, conflicting instruments take effect in the order of their recordation. These statutes pertain only to properly acknowledged instruments. This writer finds no provision of federal law which supersedes or limits these statutes where instruments affecting public land are involved.

Federal statutes and departmental rules and regulations frequently refer to "record title" in respect to transfers and assignments of oil and gas interests in public land. This reference is only to the status of the title as shown by the records of the Bureau of Land Management, the primary purpose of which would appear to be to serve as a respository of information, and not an instrumentality of legal notice.

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[26] PATTON, TITLES § 296 (2d ed. 1957).

[27] 66 C.J.S. *Notice* § 13 (b) (1950).

The purpose of state recording acts is more far-reaching. Their object is to secure a prompt recordation of all conveyances by according priority of right to the purchaser who is first to record his conveyance and to protect subsequent purchasers against secret and unknown conveyances and agreements. To preserve an accessible history of each title is only an incidental purpose.[28]

From time to time, however, disputes arise between individuals having conflicting oil and gas interests in government land. Such disputes are for hearing and decision by the local courts, the same as if they were disputes concerning private land.

One writer has stated that leases and assignments of leases on public lands generally need only be recorded with the department having supervision of such lands; that they are not subject to the same rules of recording as instruments pertaining to private lands, and that the departmental rules and regulations take precedence over the general recording acts.[29] However, this statement is made without citation of authority and the decisions appear to be contra.[30]

The books are beginning to reflect frequent judicial review of decisions of the Bureau of Land Management involving conflicting applications for federal oil and gas leases upon the same land. In a Solicitor's Decision of 1954 it was stated that the departmental function was confined to examining the papers submitted to the Bureau to determine whether certain facts were shown and whether certain formalities had been observed with respect to such applications, and that the courts were the only proper forums for the settlement of controversies.[31]

A case, *Seaton v. The Texas Co.*,[32] decided by the United States Court of Appeals, District of Columbia Circuit, on May 8, 1958, is quite interesting. The Secretary, through the Bureau of Land Management, had twice leased the same land and the only issue was which of the two lessees was entitled to the lease. The Secretary, for reasons which appeared to him to be sufficient, cancelled the first lease, and the holder thereof brought an action to have his lease declared valid and the conflictng lease canceled. The Secretary and the second lessee were made parties. It was their contention that the questions involved were for the Secretary to decide and that the courts, though they might disagree with him, were bound by his decision and could not disturb his action. The

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281 PATTON, TITLES § 6 (2d ed. 1957).

29MILLS AND WILLINGHAM, LAW OF OIL AND GAS § 153.

30*E.g.*, Alaska Consolidated Oil Fields v. Rains, 54 F.2d 868 (9th Cir. 1932); Aronow v. Bishop, 107 Mont. 317, 86 P.2d 644 (1938); Melish Consolidated Placer Oil Mining Ass'n v. Burk-Senator Oil Co., 163 Okla. 25, 20 P.2d 879 (1933); Rue v. Merrill, 42 Wyo. 511, 297 Pac. 397 (1931).

31Solicitor's Decision, D. L. Mills (1954), A-26949, New Mexico 04111-A, Gower So 1954-48.

32256 F.2d 718 (D.C. Cir. 1958).

court said that there is a wide latitude available to the Secretary in many situations, but he is bound by the statute requiring issuance of a lease to the first applicant whose application was in order. The court further held that the Secretary's latitude is not the same in all circumstances. When the controversy is fundamentally between two private interests, as was true in that particular case, his discretion is not as great as when the controversy is between private interests on the one hand and the Secretary "as guardian of the people" on the other. There is a difference also in the latitude the Secretary possesses depending upon whether the question is factual or legal. Determinations by an administrative agency should be reversed only when the administrative action is unreasonable or plainly wrong. The court decided that the first lessee was entitled to the lease since he was the first qualified applicant, and that it was plainly and convincingly wrong for the Secretary to cancel his lease.

In a discussion of this case,[33] the Editors of the *Oil and Gas Reporter,* among other things, point out that it is well settled that once a patent to public land is issued by the Department of Interior, the Department no longer has jurisdiction over the patent. It may be set aside, if not properly issued, only by suit by the government through proper judicial proceedings. The issuance of a patent is the final act of the officers of the government for the transfer of title, and as it can be lawfully performed only after certain steps have been taken, its issuance is in the nature of an official declaration that all requirements preliminary to its issuance have been completed. An oil and gas lease is analogous to a patent in that it conveys rights to the lessee which allow him to completely possess and sell a part of the public lands, just as a patent issued pursuant to the Stock Raising Homestead Act gives the patentee the right to possess and exercise other incidents of ownership with regard to the surface of the land. Both the lease and the patent are instruments by which the United States evidences the passage of rights to private persons, and it would seem that both sets of right are property rights, *i.e.,* rights to be protected by the courts through the application of well established principles of law.[34]

In the *Seaton* case the court called attention to the fact that in a former opinion in the case it had reached the same result by relying principally upon decisions of the Supreme Court holding a patent to land once issued by the United States could be cancelled only by the judgment of a court. However, the former opinion had been withdrawn because the court had concluded that it was unnecessary to a decision of the case for the court to cope with the applicability of the land patent cases.

Should it ever be judicially determined that a lease is the equivalent

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[33] 10 O. & G.R. 1 (1959).

[34] *Ibid.*

of a patent in its finality, the Mississippi Supreme Court would probably hold that it was recordable under our existing statute making unacknowledged patents recordable. The question of notice would to some extent become academic since a lessee would need only ascertain that no other lease in conflict with his lease had already been issued and since the Secretary could do nothing further with respect to the lease except seek a cancellation for fraud or mistake in a court action brought for such purpose.

The matter of assignments of oil and gas leases is quite another thing.

An argument that the records of the Bureau of Land Management are sufficient notice to establish priority of conflicting rights between private parties must be based on the premise that the state or federal law, or both, so provide. We do not find that there is any such provision of state or federal law.

The most recent case on the subject of notice from the records of the Bureau of Land Management is *Dame v. Mileski*,[35] decided by the Wyoming Supreme Court on May 13, 1959. The owner of a one per cent overriding royalty interest, which he had reserved in his assignment of a federal oil and gas lease, made three assignments to different assignees purporting to assign to each the entire interest. The first assignment, to Dame on February 11, 1952, was filed for record in the regional office of the Bureau of Land Management on February 21, 1952, and recorded in the local county clerk's office on November 22, 1954. The second assignment, to Anderson on February 14, 1952, was recorded in the clerk's office on June 17, 1953, but it was not filed with the Bureau. The third assignment, to Mileski on November 6, 1952, was filed with the Bureau on November 21, 1952, and in the clerk's office on November 16, 1952. Mileski brought a quiet title action against the other grantees. Anderson did not appear. Dame answered and asserted that his prior filing with the Bureau was constructive notice to Mileski, so that Mileski was not a bona fide purchaser for value, even though Mileski's assignment was the first filed in the county clerk's office. The trial court found for Mileski and the supreme court affirmed, saying:

> Defendant argues that the filing of his assignment with the Land Office constituted constructive notice and justifies his position on several different grounds. He points out that the Department of the Interior has the obligation of leasing public lands and is, accordingly, authorized to promulgate regulations therefor. He then calls attention to 43 C.F.R. § 192.141 (1954), which provides:
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> > [A]ll instruments of transfer of a lease or of an interest therein, including assignments of working or royalty interests, and operating agreements, and sub-

[35]340 P.2d 205, 10 O. & G.R. 853 (Wyo. 1959).

> leases, must be filed for approval within 90 days from the date of final execution and must contain all of the terms and conditions agreed upon by the parties thereto. . . .

He goes on to say that the trial court and incidentally the parties to the action are bound to take judicial notice of the provisions of the regulations, citing South v. Wishard, 146 Cal. App. 2d 276, (6 O. & G.R. 1147), 303 P.2d 805; Arnold v. Universal Oil Land Co., 45 Cal. App. 2d 522, 114 P.2d 408; and Livermore v. Beal, 18 Cal. App. 2d 535, 64 P.2d 987. Inasmuch as all of these cases emanate from the jurisdiction of California, the first matter of importance is to ascertain the statutory provisions as to judicial notice in that State. We find that Section 1875, West's Annotated California Codes, Civil Procedure, states:

> Courts take judicial notice of the following facts: . . . . 3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States, and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states; . . .

The California cases cited by defendant are based upon this statute, Arnold v. Universal Oil Land Co., *supra*, having held, largely on the authority of Livermore v. Beal, *supra,* that the persons interested in the subject matter of the records and orders of executive departments of the United States are also charged with notice.

The Wyoming statute on judicial notice is as follows: "Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. Section 3-3109, W.C.S. 1945." Comparison of these statutes discloses that the scope of judicial notice as to public records is, therefore, much more limited in Wyoming than in California.

The wisdom of various statutory provisions as to judicial notice may well be debatable. Persons favoring an enlarged area of administrative matters which a court can notice, without the necessity of taking evidence, point out the resulting facility in the trial of lawsuits. Those favoring more restricted assumption of facts by the courts insist that in these days of tremendously increased activities by executive and administrative bodies a litigant would, under broader statutes, be charged with knowledge of scores of activities of which he actually knew nothing. Be that as it may, the wisdom of the procedure is not one for the courts but for the people through legislation. We are guided, as are the California courts, by the statute applicable to the jurisdiction. Accordingly, the California cases cannot be precedent on this phase of the question.

Defendant also quotes Schnee v. Schnee, 23 Wis. 377, 99 Am. Dec. 183, 185:

> The last purchaser in such case may be, and no

> doubt is, chargeable with knowledge of any facts appearing by the records of the land-office at which he purchases, or of the general land-office, going to show the claim or title of the first purchaser . . .

It is significant to note the next sentence of the court's opinion: "And the doctrine may, under some circumstances, perhaps, be carried somewhat farther; but it clearly does not apply to a case like this; and the authorities cited by counsel do not sustain his position . . . ." Clearly, the pronouncement is dictum only and of such a general nature as to be of no help.

No other state cases are cited on this point, but defendant contents himself with reference to Interior decisions in which constructive notice of Federal records is discussed. Obviously, these cases dealing with Federal agency matters can have no bearing on this problem.

Defendant quotes a general reference to constructive notice in 39 Am. Jur., Notice and Notices, Section 7, wherein it is stated:

> Constructive notice is the law's substitute for actual notice, intended to protect innocent persons who are about to engage in lawful transactions. *It is a legal inference from established facts and, like other legal presumptions, does not admit of dispute.* . . . (Emphasis supplied.)

The statement hardly supports defendant's thesis. Where the law is as in California, the constructive notice does not admit of dispute. Where the law is as in Wyoming, there is, of course, the most serious dispute. The effect of the recording of an instrument as charging a subsequent purchaser with notice thereof is solely by reason of the statute to that effect and is necessarily confined. 5 Tiffany Real Property, 3 ed., p. 15; see also 5 Thompson on Real Property, 1924, p. 3.

In commenting on this decision, the Editors of *Oil and Gas Reporter* have the following to say:

> From the result of this decision, it appears that the Wyoming recording statute applicable to conveyances of real estate (sec. 66-119, W.C.S. 1945) includes transfers of royalty interests created out of the initial rights given to an oil and gas lessee by the United States. It would further appear that the filing of a royalty assignment, initially created out of a federal oil and gas lease, in the Bureau of Land Management district office does not operate to give rise to any 'constructive notice' with regard to subsequent purchasers of the interest. However, the decision is far from satisfactory on the latter point in view of the Court's mixed discussion of 'judicial notice' and 'constructive notice.' By citing the Wyoming statute on judicial notice, the decision indicates the Court would not take judicial notice of the fact that the Department of Interior has issued extensive regulations concerning federal oil and gas leases, which regulations might give rise to

> principles of constructive notice. In distinguishing cases from California because of the difference in judicial notice statutes, the Court stated, 'Where the law is as in California, the constructive notice does not admit of dispute.' It is difficult to understand the full import of this statement, inasmuch as there is no federal statute which provides that the filing of transfers of interests in the BLM office will operate as constructive notice as to subsequent purchasers.
>
> As substitutes for knowledge in determining whether a subsequent purchaser in good faith within the protection of a state recording statute is protected, courts speak of 'constructive notice,' 'implied actual notice,' and 'actual notice' (39 Am. Jur., *Notice and Notices,* Sections 3, 4, and 6). The notice imputed to all by recordation pursuant to a statute is often described as 'constructive notice' or 'record notice.' However, 'constructive notice' or 'implied actual notice' is also imputed to a subsequent buyer when the facts suffice to impose the duty of investigation so that the purchaser is charged with notice of what a proper investigation would have discovered (6 Powell on Real Property Section 916). It would appear that any person seeking to acquire any type of interest in a federal oil and gas lease would be extremely negligent if he failed to consult the records of the appropriate land office to determine the existence and validity of the interest since the federal regulations creating such interests provide for various administrative actions, including filing, which appear as a matter of public record. It is submitted that the peculiar factual situation involved in federal oil and gas leasing is such that purchasers of interests therein should ordinarily be charged with the duty of an investigation of the land office records and knowledge of what he would have found. The instant decision does not appear to foreclose such a possibility in Wyoming if evidence is introduced of the facts which the Court here refused to judicially note.

While referring to notice somewhat freely as both constructive and judicial, it is clear that the Wyoming court was talking about judicial notice, which was the only type of notice in issue.

Our Mississippi statute on judicial notice is Section 1761 of the *Code* of 1942. It reads as follows:

> When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state.

It is similar to the Wyoming statute and is much more limited in its application than the California statute. It authorizes the taking of judicial notice of laws only and not of records, and we must conclude that it is not broad enough to permit Mississippi courts to take judicial notice

of the priority of filings as reflected by the records of the Bureau of Land Management.

What would be the situation if the Mississippi statute on judicial notice clearly encompassed records of the Bureau, or if it were amended so that it unmistakably did so? Judicial notice is a rule of "evidence" and not of "substantive law."[36] Courts take judicial notice of particular matters or facts and dispense with the necessity of proving them. But this is done in litigation. The holder of a federal oil and gas lease does not want to be put to the expense, delay and bother of litigation, even where the results are assured, to make his title a matter of record by judicial decree. What he wants, of course, is some system of recording under which he can be assured that he has a valid record title, supported by a record chain of title, which of itself constitutes record notice to the world.

Sections 1744 and 1745 of the *Code* of 1942 make provision for the introduction into evidence of certificates and certified copies of records of the Bureau of Land Management and other offices of the United States, but it is inconceivable that such statutes would be held to limit or to be in conflict with the operation of Mississippi statutes requiring acknowledgment of instruments before recordation and giving priority to instruments on the basis of their order if filing for record in the clerk's office of the county where the land lies.

CONCLUSION

The problem discussed in this paper can be resolved by simple legislation as to the oil and gas lease itself which the United States issues and by the assignment being dealt with by the title attorney in the same manner as he would deal with the assignment of a lease upon private land.

Legislation could be accomplished by amending Section 866 of the *Mississppi Code* so as to make not only patents but other instruments executed by and in the name of the United States and pertaining to lands in this state, whether acknowledged or not, recordable in the office of the chancery clerk of the county in which the land lies. This writer suggests that oil and gas leases be expressly named in the statutes as amended. In the case of assignments of oil and gas leases, the title attorney should require acknowledgment by the assignor in every case.

Of course the judicial notice statute, Section 1761 of the *Code* of 1942, could be amended so as to authorize the court to take notice of federal records in the office of the Bureau of Land Management which pertain to oil and gas interests in public land in this state, but this would afford little relief for the reason hereinbefore indicated.

Mississippi could of course enact an entirely new statute making the

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[36]McELROY, MISSISSIPPI EVIDENCE § 12 (1955).

federal records constructive notice, but this would place a hardship upon those dealing in federal oil and gas leases in that they would be put to the trouble, expense and delay incident to obtaining information from such records, whether through Washington attorneys or directly from the Bureau of Land Management. Federal legislation making the Bureau's records constructive notice in all of the states would supersede state statutes or supply omissions therein but would be subject to the same objection.

WHEN IS AN ARCHITECT LIABLE?

*Gibson B. Witherspoon**

I. HISTORICAL

The Babylonian justice, under the Code of Hammurabi, for a builder was swift and severe. Death was required "of a builder's son for a house being so carelessly built as to cause death to the owner's son." The vogue of *lex talonis* was continued by the Romans. From the monument of Babylonian justice the pendulum swung to the furtherest extreme in the English law of no liability, during a period of three thousand years. British barristers developed a rule that an architect's duty is not merely ministerial but that he is in a position of an arbitrator between the parties and could not be held liable for the result of his decision, if free of fraud or collusion. Even in cases where there was a refusal to give either grounds or reasons for his apparently erroneous decisions, the courts held the super arbiter was not required to even explain.[1] Early American decisions, following the English rule, held the architect not liable for negligence in making decisions under the quasi-arbitrator theory.[2] In our modern times the pendulum is slowly swinging away from the early decisions. Architects' decisions are binding on all parties but liability for negligence is governed by common law. In three general classes of cases the architect has been liable for negligence and there are miscellaneous fringe areas where new theories are developing.

II. LIABILITY FOR DEFECTS ATTRIBUTED TO PLANS AND SPECIFICATIONS

An architect, in preparation of plans, drawings and specifications, owes to his employer the duty to exercise his skill, ability, judgment and taste both reasonably and without neglect.[3] The measure of damages for defects of construction attributable to the lack of skill either in preparations of plans or supervising of construction has developed two distinct rules depending on the character of the defects, rather than lack of uniformity in different jurisdictions. If defects can be remedied, the cost of the remedy is the true measure of damage. If the defect is so intimately

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[1] *E.g.*, Stevenson v. Watson, (1879) L.R. 4 C.P.D.

[2] See 3 AM. JUR. *Arbitration and Award* § 100 (1939).

[3] *E.g.*, Bayshore Dev. Co. v. Bonfoey, 75 Fla. 455, 78 So. 507 (1918). This rule is also followed in Canada. See Cauchon v. MacCosham, 19 D. L. R. 708 (1914). A principal-agent relationship exists because of the contractual relation with the owner. 6 C. J. S. *Architects* § 7 (1937).

connected with the body of the structure, or is so inherent in some permanent part of the structure, that it cannot be remedied at a reasonable expense or without tearing it down and rebuilding it, then the proper measure of damages is the difference between th value of the building now and the value it would have had if it had been made upon correct plans and specifications.[4] Complications arise where there are two causes contributing to the defect. The architect is only liable for his part thereof, but he is not allowed anything for preparation of the plans since he failed to supply proper ones.[5]

Efficiency of an architect in the preparation of plans and specifications is tested by the rules of ordinary, reasonable skill usually exercised by one in the profession. However, an architect undertaking to prepare plans does not imply or guarantee either a perfect plan or satisfactory results.[6]

These general principles attributed to error in the plans or specifications of the architect usually occur when:

1. The fixtures are not adequate for their intended use;
2. The roof, floors, or walls become cracked, buckled, collapsed;
3. The foundation is not sufficient to provide adequate support; or,
4. The waterproofing is not sufficient to prevent leaks or seepage[7].

Occasionally the owner claims that the architect is responsible for defects in the work which are alleged to have been caused by improper or unsuitable material prescribed in the specifications. These are usually claimed as offsets or counterclaims where the architect sues the owner for his fee for preparation of plans and specifications. But where there is error or oversight in the preparation of the plans necessitating repairs, such repair cannot be made with unnecessary expense or in an extravagant form if the owner expects recovery of the amount of the disbursement.[8]

An architect, employed to complete a building according to the plans and specifications of a preceding architect, is not responsible to the employer for error in such plans and specifications, nor is the architect responsible if the workmanship and materials prescribed do not meet the approval or expectation of the employer. But such architect is required to complete the building in a reasonably careful and skillful manner and

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[4]See, *e.g.*, Truck and Gordon v. Clark, 163 Iowa 620, 145 N. W. 277 (1914). See generally 3 AM. JUR. *Architects* § 20 (1939).

[5]Annot., 25 A. L. R.2d 1085, 1103 (1952).

[6]White v. Pallay, 119 Ore. 97, 247 Pac. 316 (1926).

[7]White v. Pallay, 119 Ore. 97, 247 Pac. 316 (1926); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951); School Dist. of King Co. v. Josenhans, 88 Wash. 624, 153 Pac. 326 (1915); See generally Annot., 25 A.L.R.2d 1085, 1094-96 (1952).

[8]See Bayshore Dev. Co. v. Bonfoey, 75 Fla. 455, 78 So. 507 (1918).

in substantial compliance with the plans and specifications of the preceding architect.[9]

III. LIABILITY FOR PERSONAL INJURY OR DEATH CAUSED BY IMPROPER PLANS, DESIGNS OR SPECIFICATIONS

In the early cases it was declared that no cause of action in tort could arise from a breach of contract unless there was "privity of contract" between the architect and the injured plaintiff. In more modern time the doctrine has either been limited, modified or completely rejected.[10] The famous case of *MacPherson v. Buick Motor Co.* held a manufacturer of an inherently dangerous Buick automobile liable for injuries to a remote user.[11] Dean Prosser declares, "There is no visible reason for any distinction betwen the liability of one who supplies a chattel and one who erects a structure. . . ."[12] Pennsylvania was one of the first courts to follow this line of reasoning, holding: "There is no reason to believe that the law governing liability should be, or is, in any way different where real structures are involved instead of chattels. There is no logical basis for such a distinction. The principle inherent to liability cannot be made to depend merely upon the technical distinction between a chattel and a structure built upon land."[13] Architects, engineers and contractors should be held liable to persons with whom they have no privity of contract for injuries sustained, even after the erection of a dangerous structure, under the same principles of negligence applicable to manufacturers.[14] It appears that the proper test of liability is whether the manufacturer, architect or contractor should recognize that his failure to exercise reasonable care involves an unreasonable risk of causing substantial bodily harm to those using the chattel or structure in a manner and for a purpose for which it was created. Morever, an architect or engineer in preparing plans and specifications for the construction of a building under employment by the owner is following an independent calling, and is doubtless responsible for any negligence in failing to exercise the ordinary skill of hs profesion, which results in the erection of an unsafe structure whereby anyone lawfully on the premises is injured.[15]

By undertaking professional service to a client, an architect impliedly represents that he possesses — and it is his duty to possess — that degree

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[9]May v. Howell, 32 Del. 221, 121 Atl. 650 (1922).

[10]See Annot., 58 A. L. R.2d 865 (1958); Annot., 13 A. L. R.2d 191 (1950).

[11]217 N. Y. 382, 111 N. E. 1050 (1916).

[12]PROSSER, TORTS 517, § 85 (2d ed. 1955).

[13]Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949). See generally Annot., 58 A.L.R.2d 865, 891 (1958).

[14]*E.g.*, Inman v. Binghampton Housing Authority, 1 App. Div. 2d 559, 152 N.Y.S.2d 79 (1956).

[15]See Potter v. Gilbert, 196 N.Y. 576, 115 N.Y.S. 425 (1909).

of learning and skill ordinarily possessed by architects of good standing practicing in the same locality. It is his further duty to use the care ordinarily exercised in like cases by reputable members of his profession practicing in the same locality. Additionally, he must use reasonable diligence and his best judgment in the exercise of his skill and the application of his learning in an effort to accomplish the purpose for which he is employed. However, there are limitations on the duties of an architect.

> The responsibility of an architect does not differ from that of a lawyer or physician. Where he possesses the required skill and knowledge and in the exercise thereof has used his best judgment, he has done all that the law requires. The architect is not a warrantor of his plans and specifications. The result may show a mistake or defect, although he may have exercised the reasonable skill required.[16]

An architect, employed by a school trustee to draw plans and specifications for a school building which met with the approval of the trustee, was held not liable when a child fell over a wall onto a concrete floor. The alleged negligence was based on the absence of a guard rail. However, great stress was laid on the theory that a public officer vested with discretion, when exercising his judgment in matters brought before him, is immune from liability to persons who may be injured as a result of an erroneous or mistaken decision, provided he acts within the scope of his authority and without either willfulness, malice or corruption. The court held the architect was employed simply to draw plans and specifications for the school building; that the plans and specifications prepared were submitted to the trustees, discussed, changed, modified, corrected and finally approved; and thereafter the school was constructed according to the new plans and specifications. "It would be a strange rule of law which would excuse the act of the official in passing upon the plans and adjudging them sufficient and yet would hold the person who drew them liable in damages because of alleged incompetence."[17]

Another category of architect's liability arises before the building is completed and involves cases wherein injuries or death results from a collapse of the structure due to defective plans or designs. The interesting case of *Clemens v. Benzinger*[18] serves to illustrate the point. There the plaintiff's intestate was employed by a contractor engaged in the erection of structural steel for a grandstand. Fatal injuries were sustained when he was struck by a steel column, which fell because a wrong type

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[16]Bayne v. Everham, 191 Mich. 181, 163 N.W. 1002 (1917).

[17]Sherman v. Miller Constr. Co., 90 Ind. App. 462, 158 N.E. 255 (1927). *Contra.* Molitor v. Kaneland Community Unit Dist., 181 Ill. 2d 11, 163 N.E. 2d 89 (1959) (governmental immunity of school districts specifically abolished as a matter of public policy).

[18]211 App. Div. 586, 207 N.Y.S. 539 (1925).

bolt had been used to anchor it to concrete which had not hardened sufficiently to bear the strain and weight of the column. Judgment was rendered against the contractor who did the work, the contractor who did the structural steel work, and the architect who supervised. The appellate court affirmed the judgment against the architect. Liability could be predicated on his supervisory activities, namely his failure to notify the contractor engaged in the erection of the structural steel of the true conditions after authorizing and directing the placing of the anchor bolts in the drilled holes with their strength as supports wholly dependent on the resistance of the unhardened cement; or it could have been based on the defect of the original plans in which the type anchor bolt to be used was not specified. The architect approved the detailed plans prepared by the contractor in which the improper type bolt was specified. "For defects in the original plans and the approval of detailed plans arising from negligence on the part of the architect liability resulted." Where there is a latent or concealed defect resulting in injury, liability also results.[19]

In the late and well reasoned case of *Day v. National — United States Radiator Corp.*,[20] a boiler exploded burning the deceased while he was installing a hot water system. The Louisiana Court of Appeals affirmed a judgment against an architect for over $83,000.00. Counsel for the architect contended that even if the rule of *res ipsa loquitur* should apply the architect may not be held liable even if found negligent because the alleged negligence is asserted to consist of failure to discharge a contractural obligation; and nonperformance of a contractural obligation does not create a cause of action in favor of a third person unless such nonperformance constitutes breach of duty owed third party. The court held the architect owed a duty to the contractor and his employeees as well as to subcontractors and their employees, whom he had every reason to anticipate would be involved in the construction of this particular project. The architect maintained that one Vince was negligent in failing to install a pressure relief valve. But the court held that Vince's gross, inexcusable negligence could be of little comfort to the architect. "The negligence of the architect combined with that of Vince in contributing to the injury and rendering him liable *in solido*. One whose negligence combines with that of another to cause injury cannot plead the negligence of such other as a defense to an action by the injured party."[21]

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[19]Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

[20]117 So. 2d 104 (La. 1959).

[21]*Id.* See generally BELL, PROFESSIONAL NEGLIGENCE OF ARCHITECTS AND ENGINEERS 179 (1959).

IV. LIABILITY OF ARCHITECT FOR ISSUANCE OF IMPROPER CERTIFICATE

The American Institute of Architects has zealously fought to preserve the high standing of all architects in the courts of our nation and especially to preserve the immunity which its members have enjoyed for centuries. The members of this outstanding association are local and fraternal in the defense of their members, and if you try to prove lack of good faith, fraud, failure to exercise skill and care or even simple negligence you will be confronted by a most difficult situation. Your status is roughly analogous to a plaintiff in a malpractice case who wishes to produce a disinterested doctor. In the early cases — and generally today — the architect's certificate is agreed to be conclusive as between the parties, and because he is acting in a dual capacity and quasi-arbitrator there is no resulting liability.[22] The reasoning of these early cases was based on the contract wherein the plaintiff owner and the contractor had both agreed that the architect would be the sole arbitrator. Then the courts held that an architect who was negligent by approving a contractor's claim for a greater amount than was actually due was liable to the owner for the excess payment made in reliance on the certificate, but not for the cost of completing the building in accordance with the contract terms.[23] Where defects in construction are discovered after a supervising architect has given the final certificate, evidence of such defects might give rise to a claim for damages in recoupment in the architect's action for his services, but a showing of negligence does not constitute a complete defense to the claim for compensation.[24] Architects, being skilled persons, are held to a higher degree of care than unskilled persons and if they fail in the duty owed either in the preparation of the plans or in the supervision of the work, liability will result for the damages proved by the owner.

Where a roof collapsed after an architect, who prepared plans and supervised work, gave his final certificate, the court rejected the theory that progress payments were merely authorizations for the contractor to draw proportionate parts of his pay. The fact that the condition which caused the collapse was known to the owner was held not to preclude recovery, since the owner was entitled to rely on the sufficiency of the construction as certified by the architect. The certificates given during the progress of the work were each evidence that the work had been satisfactorily completed by the contractor.[25]

A supervising architect acting fraudulently or in collusion with one

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[22]See 3 AM. JUR. *Arbitration and Award* § 100 (1939); Annot., 42 L.R.A. (N.S.) 282 (913).

[23]*E.g.*, Bump v. McGrannahan, 61 Ind. App. 136, 111 N.E. 640 (1916).

[24]Lindeberg v. Hodgens, 89 Misc. 454, 152 N.Y.S. 229 (1915).

[25]School District v. Josenhans, 88 Wash. 624, 153 Pac. 326 (1915).

of the parties in issuing payment certificates can be held liable for all resulting damages. A question of fact is presented for an architect's negligence in issuing a certificate, but a false certificate based on fraud or collusion renders the architect liable for all damages since he owes the owner a fiduciary duty of both loyalty and good faith.[26]

In the well-reasoned case of *State v. Malvaney*,[27] it was held that where the contract required the contractor to submit evidence to the architect that payrolls and materials bills had been paid before issuing a certificate of substantial completion, it was negligence, which resulted in liability, if the architect failed to require such evidence and, by issuing his certificate, released the retainage. The surety had a right of subrogation, since it was entitled to protection. The court rejected the contention that the architect could not be held liable because there was no privity of contract between the architect and the surety. The duty to ascertain that the contractor had paid the bills was owed both to the building owner and the surety, for whose mutual protection the retainage was provided. The failure of the architect to exercise due care and diligence in carrying out his duties might result in loss to the surety, when he undertook the performance of an act which, if negligently done, would result in loss, so the law imposed upon him the duty to exercise due care to avoid such loss even in the absence of a contractual relationship. The fact that the surety had taken no steps to ascertain that outstanding bills for labor and materials were being paid by the contractor was held not to charge it with contributory negligence, since it had the right to assume that the retainage would not be released until the contract had been fully performed.[28]

A carelessly issued certificate by an architect may injure not only

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[26]*E.g.*, Palmer v. Brown, 127 Cal. App. 2d 44, 273 P.2d 306 (1954).

[27]221 Miss. 190, 72 So. 2d 424 (1954).

[28]*Id.* See generally Annot., 43 A.L.R.2d 1227 (1955) (Liability of architect or engineer for improper issuance of certificate).

In the *Malvaney* case the defendant unsuccessfully raised five separate defenses as follows:

1. There was no privity of contract between the architect and the surety and therefore no duty was owed the surety and no damages could be recovered regardless of negligence.

2. That retainage is not a trust fund and therefore there is no lien thereon either legal or equitable for the benefit of the surety.

3. If the surety had a cause of action, it did not keep up with the project and architect was entitled to the defense of contributory negligence (as in automobile cases in Mississippi).

4. That by agreement of the parties the architect was the sole judge of what evidence should be required that the material bills were paid and he acted in a quasi-judicial capacity.

5. If the surety had any rights under equitable subrogation it did not accrue until either the date the contractor gave notice of his default or when the surety actually paid the outstanding bills for materials.

the owner but the surety. In *Hall v. Union Indemnity Co.*,[29] the architect's certificate certified progress payments which overpaid the contractor, who thereafter defaulted. The owner brought suit against the surety on his bond guaranteeing faithful performance. The surety company defended on the ground that the architect had not followed the contract in issuing the certificate. The contract provided, as all standard forms provide, that payment would be made upon invoice presented to the contractor. The court ruled that the architect in certifying amounts due on the basis of these estimates was acting as agent of the owner and the architect's violation of the terms of the contract was chargeable to the owner. The improper certificate would be an increased risk to the surety. Consequently, the surety would have been released under the bond except for an estoppel that was found in this case.[30]

Where the architect is rendering a partisan service to the owner, there seems to be little question that the certificate must be made with reasonable care after the exercise of professional judgment.[31]

Another interesting case involving liability for a carelessly issued certificate is *Corey v. Eastman*.[32] Here the contractor secured a certificate from the architect stating that more than the amount of work necessary for the first payment had been completed. The owner was doubtful, but upon reassurance from the architect that the certificate was correct, the owner paid. The builder thereafter went into bankruptcy. Upon a finding that the certificate was improperly issued, the owner sought and recovered damages from the architect.

V. MISCELLANEOUS LIABILITY

Thus, we find the pendulum has passed three general classes of cases where the architect or engineer is liable. However, there are other areas where the courts impose liability. Misrepresentation as to the costs of the building should result in liability to the architect.[33] Where the final estimate of the building was $400,000.00 and the completed cost $700,000.00, the court held the architect liable for an intentional misrepresentation in a suit for the $300,000.00 differential.[34] Where the costs exceeded the estimate of $125,000.00, the court held the architect liable, but pointed out it would be inequitable to allow the owner to retain the more valuable building and still recover the difference between the estimate and the actual cost.[35] The architect cannot hold up construction by late completion of plans without subjecting himself to a claim for

[29] 61 F.2d 85 (8th Cir. 1932).

[30] *Id.* See generally BELL, *op. cit. supra*, note 21, at 717.

[31] *E.g.*, Coombs v. Beede, 89 Me. 187, 36 Atl. 104 (1896).

[32] 166 Mass. 279, 44 N.E. 217 (1896).

[33] See PROSSER, TORTS, § 87-88 (2d ed. 1955).

[34] Edward Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 Pac. 351 (1912).

[35] Capitol Hotel Co. v. Rittenberry, 41 S.W.2d 697 (1931).

damages for delay. In short, an exactness of performance in this regard is required from the architect.[36]

In a late book the authors lament that the South, so rich in traditions, is also "guilty of imitating itself to death" in architecture.[37] It seems voluminous proof as severe criticism of architectural corruption as it is a paean of progress. Only a few contributions have been made—among these, Jefferson's Georgian adaptation. Charleston contributed the town house with its two-story verandas. New Orleans refined the town house with courtyards. In the Natchez area the palatial plantation house was a sensible refinement of European originals. "The South," they write, "has been scourged by pseudo neo—Georgian neo—Charleston neo—Orleansean eclectic buildings. Mass produced, catalog-numbered wrought ironwork, wood columns and Georgian doors are superimposed and applied upon houses and buildings as a kind of costume that one might wear to a fancy dress ball."

Many architects and engineers apparently do copy the plans of other members of their profession. This poses a question. Suppose an architect really has a new idea and puts on his plans and specifications, "(C) All Rights Reserved," and has his new idea copyrighted. It is our belief he would have a cause for action against all other architects who stealthily stole his ideas and plans.

In England the present Copyright Act[38] provides:

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[36]*E.g.*, Edwards v. Hall, 293 Pa. 97, 141 Atl. 638 (1928).

[37]WAUGH, THE SOUTH BUILDS: NEW ARCHITECTURE IN THE OLD SOUTH.

[38]Copyright Act of 1956. The work of architects is copyrightable under the British Act, § 35 (1). See COPINGER, COPYRIGHT 209-215 (8th ed.) This is the Standard British text. It devotes a whole chapter to the "Works of Architecture". However, the copyright in a work of architecture is not infringed by making a painting, drawing, engraving or photograph of the work or the inclusion of the work in a cinematograph film, or in a television broadcast.

The American authority, WEIL ON COPYRIGHT at 83 says:

> While it may be doubted if a work of architecture may be copyrighted, after completion, under the United States Act, no good reason seems to exist, under this section, why adequate protection may not be obtained by architects, if they coypright their models or designs. This right — completing, executing, and finishing — is supplementary, or correlated as an antecedent right to the general rights given by Section (a) of Section 1.

Certainly architectural drawings fall within Class I of the United States Copyright Act, this including drawings or plastic works of a scientific or technical character. However, where they are other than working plans, they may be essentially artistic in character as pointed out by authorities and would fall into Class G—Works of Art. Horace G. Bell in the publication, LAW OF COPYRIGHT AND LITERARY PROPERTY, observed: "It seems likely that the Copyright Act [When a case arises on this point] will be interpreted as limiting protection to architectural plans as distinct from architectural works." Therefore, whereas the plans may be protected under Class I, the completed work is more difficult to protect under our present copyright laws. Apparently architects should consider pursuing design patent protection for the design of a unique building construction.

3—(1) In this Act "artistic work" means a work of any of the following descriptions, that is to say,—

(a) the following, irrespective of artistic quality, namely paintings, sculptures, drawings, engravings and photographs;

(b) works of architecture, being either buildings or models for buildings;

(c) works of artistic craftsmanship, not falling within within either of the preceding paragraphs.

History moves on and the pendulum swings past other cases, which are destined to be beacon lights for architects' liability in the future. Where common law negligence can be proven, you have a cause of action against the architect. Maybe in the future also one architect may sue another architect for infringement on his copyrighted plans and specification.

STATE BAR SECTION

CRIMINAL LAW DISCUSSION PANEL*

Judge W. N. Ethridge, Jr., Oxford and Jackson, Moderator

Honorable Earle L. Wingo, Hattiesburg

Honorable Boyce Holleman, Wiggins

Honorable Stanny Sanders, Greenwood

Honorable John W. Prewitt, Vicksburg

Honorable James S. Finch, Hattiesburg

Honorable E. Hugh Cunningham, Jr., Jackson

JUDGE ETHRIDGE:

I should like to say as moderator, in the hour and a half allotted to this program, we are not going to discuss, except incidentally, what the law ought to be. Our concern is with what it is now, and also, with its developments insofar as the practice of law is concerned. So the aim of this panel is to try to make an analysis which is significant for the practicing lawyer, to make it as practical as possible. Of course criminal law is a is a broad field, so the members of the panel have decided to devote thirty minutes of discussion and questions and answers to each of three aspects of criminal law which are of considerable importance, and about which there is much misunderstanding. Those three subjects are: First, "the admissibility of admissions and confessions of accused," secondly, "insanity in c r i m i n a l cases," a n d, thirdly, discovery in criminal cases." One member of the panel will make a ten minute introductory analysis on a subject, followed by a five minute discussion by another panel member, following which there will be an interchange of ideas and questions among the panel members, and at least five minutes allotted to any questions which any of you may care to ask.

So, to start the program, I am going to ask Mr. Sanders if he will give us an introductory analysis of the questions dealing with the admissibility of confessions and admissions of an accused.

MR. SANDERS:

In a substantial number of the criminal cases which are contested, the state bases its case to a great degree on statements made by the accused previous to the trial, so certainly the admissibility of admissions and

*This panel discussion was presented at the Mississippi State Bar convention held on June 17 and 18, 1960.

statements made by the accused deserves a place in any forum on criminal law. At the outset, it might be important to point out that there is a distinct difference between a confession which is an outright admission by the accused that he is guilty of the offense, and an admission which is an acknowledgment not that he committed the offense but of facts that point to the guilt.[1] In other words, when a man is tried for larceny, if he denies that he stole the cow but is in possession of the cow shortly after its theft, that is not a confession, but an admission. That is important because in many states the state is not required to meet as heavy a burden in getting an admission admitted as it has to meet when it is getting a confession into evidence. Now we have one case in Mississippi which indicates, if the question is ever presented to our court, that the rule for the admissibility of an admission will be the very same as it is for a confessions.[2] If the statement involved is not an outright confession, just remember that there might be a difference in the rules of evidence which apply. But as a practical matter, both prosecution and defense attorneys consider that the rules are the same. In other words, when the state wants to introduce any statement made by the accused, it should do so on the basis that the rules applicable to a confession apply.

It is elementary that a confession cannot be introduced into evidence unless the state first proves the corpus delicti. Ordinarily, the state has very little difficulty in proving the corpus delicti, but in arson cases, particularly, it is hard sometimes to prove corpus delicti. It is not an infrequent thing that the state will have a confession of arson, and still not be able to get past the charge to the jury because of the inability on the part of the state to prove corpus delicti. This is basic, but you have to prove the corpus delicti and as soon as you have proven it, if you do have a statement of the accused, then it can be offered. Let's keep this in mind about offering a confession when the corpus delicti is proved. The state is in a position then to offer the confession, but before doing so, the burden is on the state to show that that confession was freely and voluntarily made, without fear induced by injury or threatened injury or promise or hope of reward. The way that is generally done, as all of you know, is for the witness who is introducing the confession to state in general terms that no force or violence or threats of force or violence were made and that there was offered no hope or promise of reward. When the state makes this proof, if the defense does not then and there object to the admissibilty of the confession it will be admitted. So, defendants, if you want a preliminary hearing on the admissibility of a confession, that is the time to object.

I will mention four things which I think are important with reference to this preliminary hearing on a confession. First, if the defense

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[1]20 Am. Jur. *Evidence* § 560 (1939).

[2]Ruffin v. State, 205 Miss. 642, 39 So. 2d 269 (1949).

requests a preliminary hearing, the court has no choice except to grant it. If the court refuses to grant the defense a preliminary hearing out of the presence of the jury, it is reversible error. Second, the defendant can testify on the preliminary hearing as to the competency or incompetency of the confession without subjecting himself to cross-examination on the question of his guilt of the crime charged. In other words, the accused has a right to take the witness stand during the preliminary hearing, and can limit his testimony to facts bearing upon whether the confession was free and voluntary. Third, if on the preliminary hearing the defense makes proof that the confession was not free and voluntary — in other words, suppose the defendant says he was beaten and there were four officers present — then it devolves on the state to put those four officers on the stand in rebuttal, or else explain why the officers were not used. If the state just puts one of those officers on to rebut, a reversal will result, for it is reversible error not to use the other three officers or to explain why they cannot be there. If after hearing the testimony the court has a reasonable doubt as to whether the confession was free and voluntary, then the court should not let that confession get to the jury. Fourth, if the court on that preliminary hearing out of the presence of the jury holds that the confession is admissible, then the state must put the testimony as to the admissibility of the confession in again in the presence of the jury. If the defendant wants to put his testimony in as to the fact that it was not free and voluntary, then he must do that again in the presence of the jury. In other words, when the jury comes back, repeat what you have done in the absence of the jury.

I will read from Alexander as to what instruction the defendant is entitled to on the weight to be given to a confession. I am reading from Alexander: "A summary of the matter is that it is never proper to instruct the jury that it may reject the confession as being inadmissible on the ground of undue and improper coercion, since its admissibility is solely for the court." The admissibility of the confession is a matter for the court to decide and you can't instruct the jury along the lines there indicated. And here is what the defendant could do: "Such a charge may do no more than inform the jury that it may reject the confession if it believes it to be untrue and if it believes it was made under improper influences. Such finding may be taken into account in determining what weight or credit, if any, it would attach to it as evidence." In other words, the jury can't decide on its admissibility, but it can give it such weight as it wants to give it.

Let's go on to some circumstances to which the Mississippi court has given specific attention in determining the voluntariness of confessions. First, I will list some circumstances which the court has held do not, in themselves, render a confession inadmissible: (1) Defendant being handcuffed and in the custody of the sheriff; (2) failure by an

officer to warn the defendant that a statement may be held against him; (3) persistent questioning by officers; (4) exhibition of a pistol without making threats therewith; (5) being detained without a commitment; (6) being under arrest without a formal charge; (7) inducements held out by private persons without any kind of authority. If a sheriff tells a defendant he will try to or will see to it that he gets a light sentence, that automatically makes the confession not admissible.

The Mississippi court has held the following to render a confession involuntary and inadmissible: (1) Statements by an officer to a defendant that if defendant told the truth about the matter it would be all right; (2) a statement by an officer to a defendant that it might go lighter if he told all about it; (3) a statement by an officer to a defendant that it would be best for him to make a statement; (4) a promise by an official to let the defendant out of jail on bond if he would make a statement; (5) a promise by an officer to help defendant out if he is sent to the penitentiary; (6) a promise by an injured party not to prosecute; (7) a promise by an injured party to do all in his power to get reduced any severe penalty that might be inflicted; (8) threats to deliver defendant to a mob.

MR. PREWITT:

By way of supplementing the remarks made by Mr. Sanders, I will discuss with you a feature of admissions pertaining to silence of the accused, when accusatory statements are made to him by either officers or third persons, as admission of guilt. We could define this discussion as an exception to the rule that silence is golden. The general rule, as we understand it, as followed in Mississippi and some thirteen other jurisdicitions is that when an accusatory "statement is made in his presence and hearing and such statement is not denied, contradicted or objected to by him, . . . the statement is admissible as evidence of his acquiescence in its truth. . . ."Admissibility is not based on the idea that it is a statement or proof of facts of the crime, but to show the reaction of the accused, standing mute in the face of an accusation is merely a circumstance, or some evidence, from which a jury may deduce acquiescence in an accusation.

Caution must be exercised in admitting such evidence because it violates the hearsay rule, except to show the reaction of the accused when the accusation is made. There are two essentials which must be proved before this evidence is admissible. The first is that conditions existed which afforded the accused opportunity to reply, and the second is that the conditions were such as to naturally call for a reply by the accused. The evidence may be inadmissible because the statement was not in the form of an accusation.

One of the earliest cases in Mississippi dealing with this particular

point is *Pearson v. State*,[3] where a witness was allowed to testify, over the objection of defendant, that the wife of defendant had made certain accusations and charges in the defendant's presence. The case was reversed on two grounds. First, a wife cannot testify against her husband unless that privilege has been wavied; and second, the witness knew nothing about the facts of the crime, except hearsay, and for that reason it was not admisible.

Next is *Anderson v. State*[4] which was reversed when certain officers were allowed to testify that the person assaulted had positively identified defendant. Objection was made by the defense to the testimony as hearsay; and Justice McGowan, in reversing, pointed out the record was silent upon the question of the reaction of defendant to the accusatory statements. So there must be shown the reaction of the defendant.

A later decision is *Gillespie v. State*.[5] Certain accusatory statements were made by the prosecutrix in the presence and hearing of the accused which were not denied, contradicted or objected to. They were held admissible as evidence of acquiescence in their truth.

In *Jones v. State*[6] this was situation: one of the witnesses to the crime took the officers to the scene of the crime, and there in the presence of the accused went into great detail in showing the circumstances. When the officers asked if what she had related was true the accused said, "I just don't remember." Our supreme court said that the circumstances were such that the failure of the defendant to deny the accusations made the testimony admissible.

It is my judgment that the rule in Mississippi has been extended. When admissions such as these are offered in evidence, the defense attorney should immediately ask the court to retire the jury and have a preliminary examination because there are certain conditions which must be met before this testimony may go in.

Finally, we look at *Conn v. State*,[7] which arose in Belzoni. A coconspirator had made a statement in the presence of accused. The court said it was error to admit this into evidence, because it was violation of the hearsay rule, but held it was harmless error, because the proof of defendant's guilt was conclusively shown. So even in the face of trying to safeguard the defendant's rights, these damaging things get before the jury.

By way of summation, I have this to offer: when a person is charged with a crime, and we are endeavoring to represent him, we should object strenuously to the introduction of such evidence, and we should ask that

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[3]215 Miss. 363, 60 So. 2d 807 (1952).
[4]171 Miss. 41, 156 So. 645 (1934).
[5]215 Miss. 380, 61 So. 2d 150 (1952).
[6]228 Miss. 296, 87 So. 2d 573 (1956).
[7]228 Miss. 833, 89 So. 2d 807 (1956).

there be a preliminary examination out of the presence of the jury.

JUDGE ETHRIDGE:

Another question which appears to be arising more and more often is that of insanity in criminal cases. The panel has asked Mr. Wingo and Mr. Holleman to make an analysis of this problem. First, I will call on Mr. Wingo.

MR. WINGO:

A very interesting discussion of post-trial insanity, that is, where the accused became insane after the imposition of the death penalty is found in *Musselwhite v. State.*[8]

A petition was filed before the trial judge for stay of execution, alledging insanity of the petitioner occuring after the judgment of conviction of murder and the sentence of the court imposing the death penalty. Upon a hearing before the trial judge, it was found that petitioner was insane, but the court limited the stay of execution, in the nature of a supersedeas, only pending appeal. The case was reversed and remanded with direction to stay the execution of the petitioner until such time as he may properly be adjudged to have regained his sanity.

In the above case, the court held that one who became insane after being convicted of murder, and after being sentenced to death, was entitled to a stay of execution, citing Section 2588 of the *Mississippi Code* of 1942, as amended. The court further stated that the petition for a stay of execution was properly presented to the judge before whom the convicted murderer had been tried, citing again Section 2588 of the *Mississippi Code* of 1942, as amended.

The case of *Eslick v. State*[9] held for the first time that, where a suggestion of insanity has been made on behalf of the defendant, through his attorneys, he waives a preliminary hearing before a jury on that ground when the attorneys take no further steps in that regard.

Where it appears to the trial court that there is a reasonable probability that the defendant is incapable of making a rational defense, that issue must be submitted preliminarily to a jury.[10] If the defendant had desired a preliminary hearing before a jury to determine the question of his present sanity, he through his attorney, should have asked the trial court to grant the same.

In *Lang v. State*[11] we find the case where insanity occurred after the verdict but before the sentence and judgment of the court. An examination of defendant at the State Hospital disclosed that he was insane.

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[8]215 Miss. 363, 60 So. 2d 807 (1952).

[9]119 So. 2d 355 (Miss. 1960).

[10]Robinson v. State, 223 Miss. 70, 77 So. 2d 265, 83 So. 2d 99 (1955).

[11]119 So. 2d 608 (Miss. 1960).

The circuit court entered an order directing that sentence should be set aside, but not the verdict, and the defendant appealed to the supreme court. The state made a motion to dismiss the appeal, and Judge Ethridge held that the supreme court was without jurisdiction of it, since there was no final judgment in the case.

The chief problem of the defense counsel in dealing with an accused who might be insane at the time of the trial, is expense involved in obtaining pyschiatric testimony. Under House Bill 668 passed by the 1960 Legislative Session, the trial judge is given express power and authority after an indictment to order the accused to have the benefit of psychiatric examination. This is a statute which we have long needed, because until its passage there was really no authority for the circuit judge to enter such an order, nor for the county to bear the expenses, as is now provided in this new act.

The recent case of *Gambrell v. State*,[12] decided by the supreme court on May 30, 1960, appears of interest on the question of insanity at the time of the homicide and at the time of the trial. After the state rested, the defense called numerous witnesses on the issue of appellant's sanity at the time of the homicide. They detailed at length many peculiar acts of the defendant as long as a year and a half prior to the tragedy and up to the day of the tragedy. The defense introduced Dr. Claude L. Brown of Mobile, who the state admitted was a qualified specialist in the field of psychiatry, and who, after examining the defendant for a period of about forty-five minutes, and having answered a lengthy hypothetical question based on the evidence, stated that he was positive that defendant was insane at the time of the killing and did not know the difference between right and wrong, and that defendant was insane at the time of the trial. After the defendant rested his case, the state introduced six witnesses, none of whom testified that the appellant was sane during the trial.

The court in the *Gambrell* case held that whenever the question of insanity is raised and put in issue by such facts, proved on either side, it devolves upon the state to remove any doubt and establish the sanity of the prisoner to the satisfaction of the jury beyond all reasonable doubt.

Another error committed by the state in the *Gambrell* case was the obtaining of an instruction to the jury that should they find the defendant not guilty by reason of insanity and certify that he is dangerous, it would be the duty of the court to commit him to an asylum until such time as he regained his sanity, at which time he would go free. In *Nelson v. State*[13] the court condemned the exact language of the above instruction, because it was not in accordance with the provisions of Section 2575 of the *Mississippi Code* of 1942. The effect of such an instruction

[12]120 So. 2d 758 (Miss. 1960).

[13]129 Miss. 288, 92 So. 66 (1922).

was to infer to the jury that a verdict of not guilty on the ground of insanity would result in freeing the accused.

It may be of interest to note that a petition was filed before the circuit court to have Gambrell committed to Whitfield for examination and observation, which was followed by an order of the Circuit Court of Forrest County, Mississippi. The very fine instructions of the late Justice Alexander will prove most helpful in defending a person where the defense is insanity at the time of the commission of the crime, or during the trial.

The suggestion of insanity of the accused should be accompanied by affidavits or offer of witnesses to prove insanity or inability to plead or conduct a rational defense.[14]

In the early case of *Howie v. Howie*[15] the authorities, including a decision of this state, supported the writer's view that a defendant charged with crime may orally suggest to the court that he may be insane. However, *Davis v. State*[16] and *Skinner v. State*[17] are to the effect that a motion or suggestion must be accompanied by affidavits or the offer of witnesses to prove insanity, etc. Where this is not done, the court will not be required to suspend the trial and inquire into the sanity of the accused.

The *Gambrell* case is the last one involving insanity in which the judge sentenced the defendant to the gas chamber. When we read the opinion of the Mississippi Supreme Court, the defense counsel was heard to whisper, "Thank God for such a brilliant Supreme Court!"

MR. HOLLEMAN:

This question of insanity has been ably discussed by Mr. Wingo. In *Pace v. State*[18] the court held that where ever there is a showing before the trial judge which meets the burden, that is, engenders a reasonable probability that the defendant is then insane, the issue must be submitted to a jury, before impaneling a jury for the trial on the indictment. If you notice in the *Gambrell* case, all of those issues were involved in the trial of the case itself. But the rule laid down in the *Pace* case seems to very firm: once there is a reasonable probability that the defendant is insane, then it is incumbent upon the trial judge to immediately impanel a jury to try the issue of insanity. In the final analysis, the duty will rest within the reasonable discretion of the trial judge. It remains for the trial judge to determine whether in his judgment the man is capable of standing trial.

Our court has held also that there is a certain duty upon the trial

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14Skinner v. State, 198 Miss. 505, 23 So. 2d 501 (1945).

15125 Miss. 589, 88 So. 167 (1921).

16151 Miss. 883, 119 So. 805 (1929).

17198 Miss. 505, 23 So. 2d 501 (1945).

18218 Miss. 614, 67 So. 2d 521 (1953).

judge himself to determine whether the man is insane, and whether he is capable of making a rational defense. It is fundamental that a man cannot be put to trial, cannot be sentenced, and cannot be executed so long as he is insane. The best discussion of that is the language of Judge Alexander in *Musselwhite v. State.*[19] If you haven't read that decision, you should go back and read it.

I have a very interesting motion that should be heard next week. A lady killed her two children and was sent to Whitfield. She was indicted by the grand jury and there was some information indicating she was insane. She is now at Whitfield and has two indictments against her. Her examination showed she was insane and that she was insane at the time of the crime. The defense attorney has filed a motion to dismiss the indictments. I don't think the court will, of course, but the cases in the land today seem to be loosening up and getting closer and closer to what I think is dangerous ground.

I hope our court never adopts the irresistible impulse theory. In *Johnson v. State*[20] the question of irresistible impulse was presented strongly. I would certainly cling to the present rule and not move the question of insanity further away from the rule in Mississippi, that is, a man's mind must be so diseased that he is incapable of distinguishing between right and wrong.

I might say this in conclusion to those of you who are defending, when you go to get your pscychiatrist in a criminal case, make sure that you explain to him the difference between his idea of insanity and the legal definition of insanity. If you don't you may be embarrassed when you put him on the stand in the court room, because all of them I have heard testify will say that everybody is abnormal when they commit murder. I heard a pscychiatrist say that every man from Cain on down was insane at the time he committed a murder. It is vitally important, before you bring in these $250.00 a day men from a long distance, that they understand the distinction between legal insanity that you are going to have to prove and insanity as he understands it from his textbooks and his study of insanity. Our Mississippi courts have held that you must show that a man's mind is so diseased that he is unable to distinguish between right and wrong.

Another interesting question is this: Where does intoxication enter into the picture? Our court is not exactly clear of just exactly what happens to a man who is so saturated with intoxicating beverages that his mind is in the same situation as the man whose mind is completely gone because of insanity. You will find some law that says intoxication is no defense. Our rule is that it will reduce it from murder to manslaughter. When a man is so drunk that he doesn't realize the conse-

19215 Miss. 380, 61 So. 2d 150 (1952).
20223 Miss. 56, 76 So. 2d 841 (1955).

quences of his acts, he is getting very close to getting in the same position as the insane man, but the law may hold him responsible to the degree of manslaughter.

MR. FINCH:

I would like to say a few words for the state with reference to the *Gambrell* case. There were some unique points about that case; I would like to point out one, particularly. The eminent psychiatrist from Mobile was one of the finest witnesses that money could buy. He came to Hattiesburg, had a forty-five minute conversation with the patient, pronounced him insane and was so good that he made it retroactive six months. Yet that was the only time he had ever seen Tom Gambrell.

In that case the defense was one of insanity at the time of and immediately prior to the commission of the homicide. There was never a suggestion by either of the eminent defense attorneys of present insanity. To the contrary, the record would show that a stipulation was engaged in on arraignment of the accused, that there would be no suggestion of present insanity. So, of course, the state did not assume that burden in view of the absence of the suggestion and the stipulation of counsel. We thought it was a question for the jury to decide whether he was insane at the time he killed the patrolman. The supreme court held the evidence was overwhelming that he was insane at the time he committed the homicide. That issue we thought was properly submitted to the jury, who determined he was sane. However, we may have a chance to retry it. We learn something in each case we try, and, as soon as Tom gets back from Whitfield, I am sure we will learn some more at the next trial.

The Legislature recently enacted a law that the circuit judge in term time or vacation on suggestion of counsel either for the state or for the defendant can send an accused to psychiatrists appointed by the court for psychiatric examination. Up until that law was passed we had no statute, but the courts did it anyhow, usually by agreement.

JUDGE ETHRIDGE:

A couple of interesting points can be mentioned on this question of insanity. The United States Supreme Court has held that in order for the state to comply with the requirements of the Due Process Clause, there must be an adequate method for a convicted defendant to raise the issue of post-trial insanity. We don't have that procedural problem in Mississippi, because in the *Musselwhite* case the court recognized that you could follow either the coram nobis statute, whch was passed after the Willie Magee fiasco, or a motion procedure to raise the issue of post-trial insanity.

The other observation I would like to make, with reference to the

right and wrong test, is this: many recent problems have arisen because of the increased knowledge of the workings of the human mind, which the psychiatrists are learning. There is plenty they don't know, but psychiatry is developing as a very strong branch of medical science. The test set forth in *Durham v. United States*[21] has been adopted by five or six different states. It is that if the crime is the product of a diseased mind, then the man is insane in legal contemplation. Of course the Mississippi courts have not adopted that rule.

The next topic is one that may become more and more significant as time goes on. That is the question of discovery in criminal case. I am going to ask Mr. Cunningham to make the introductory statement, and Mr. Finch to supplement it.

MR. CUNNINGHAM:

The defense attorney has frequently resorted to the procedure of discovery in an effort to promote the cause of justice. In recent years a great majority of the state courts have crystalized their decisions on this subject, and have come up with a few set rules, which our own supreme court has recognized, and which can be briefly discussed. Generally speaking, when we refer to discovery in criminal cases, we have reference to certain articles, objects, documents, written matter, which are in the exclusive control and knowledge of the opposite party, of which we need to avail ourselves for the purpose of defending our client.

The general rule is that the state need not inform the accused of what evidence it intends to introduce. The court has discovery power in its sound discretion to permit the accused to inspect documents or articles in the possession of the prosecution which form the basis of the charge or which are material evidence, but the defendant is not entitled as a matter of right to an inspection. The remedy is not available for exploratory purposes. It might be had on private papers or documents or things which are not evidence material to the crime or defense and which would not be admissible, or would not be admissible except for the purposes of impeachment. But the defendant is not entitled to an inspection of statements for the purpose of cross-examining witnesses for the state.

In Mississippi we find our authority for discovery in Section 1659 of the *Mississippi Code* which provides that, on motion of either party and for good cause shown, the court may permit either party to inspect and photograph documents and articles or things of that nature which are to be used in the case. Several years ago, from Prentiss County we had a case in the supreme court involving this section of discovery in criminal cases.[22] The defendant wanted to obtain statements made by

[21]214 F.2d 862 (D.C. Cir. 1954).

[22]Eaton v. State, 163 Miss. 130, 140 So. 729 (1932).

federal officers, which they took as a result of the killing, so that the defendant might impeach on cross-examination the state's witnesses. Our supreme court held that the defendant was not entitled to a motion to produce those statements, for the reason that the petition for a writ did not state the facts expected to be proved. Therefore, in that decision it laid down the rule that, before you can have a subpoena duces tecum for the production and inspection of documents, your petition must first set forth what you as a defendant or defense attorney expect to prove. I disagree with that. Why should we as defense attorneys tell the district attorney or the state what we expect to prove by the use of those documents or objects, when the general rule is that the state does not have to tell us what they expect to prove, or that we are not as a rule entitled to inspect, unless it is material evidence, or it is necessary evidence in the trial of the case. It looks like the state, with the support of the FBI, the Highway Patrol and the sheriff's office, has available to it all of the investigative authority to be found, but when the defendant wants to inspect something in the state's possession, we have to tell the state what we expect to prove.

In *Eaton v. State* case, the court referred to a case from Lowndes County, *Stephens v. Locke*.[23] In that case the moving party for a subpoena duces tecum desired to secure a transcript of testimony that was taken in a criminal proceeding involving the same parties, this being a civil suit. The defendant filed a motion for a subpoena duces tecum to have the transcript produced. The supreme court denied the motion and, said this: "The petition, therefore, failed to set out the substance of what was expected to be proven by the transcribed notes." It appears to me that if we inform the prosecution, which has the burden of proof, what we expect to prove, we weaken our own hand. We weaken our own defense and put the state on notice where we are weak.

Not too long ago up in Itawamba County there was a homicide. A ballistics expert from Tennessee had examined the gun and was in a position to testify for the state that the lethal bullet was fired from that particular gun. A motion was filed for the production of the gun, so that the defendant might also secure the advice or information of a ballistics expert of his own choosing. That petition was granted, and it so happened the two ballistics experts agreed that the bullet did come from that particular gun. There was no prejudice or harm to the state by sustaining the motion, but there was certainly a great advantage to the defense, and the district attorney, in having the advantage of two prominent ballistics experts concluding the bullet was fired from that particular gun.

Ordinarily district attorneys think that the defense attorneys have

[23]156 Miss. 182, 125 So. 529 (1930).

no defense, but we do. We are just as anxious to see that justice is done as anybody else, but when a question arises forcing us to show our hand and state what we expect to prove, it is a little unfair, it appears to me, in the face of the provisions of *Mississippi Code* Section 1659. But when you file your motion according to these decisions, you must set out what you expect to prove; otherwise, your motion will be denied.

Another very interesting case is *Seals v. State*.[24] In Pearl River County a special prosecutor was hired in a homicide case, and some of the people down there chipped in in order to raise a fund to pay the special prosecutor. A motion was made to produce the names of those persons who contributed to that fund, so as to aid the defense attorney in the selection of the jury. It is obvious to all of us that it would be unfair for the defendant to have selected a jury to try him for his life, not knowing which juror might have contributed. The supreme court said ordinarily the motion should have been granted, but, in view of the fact that the defendant had the right on his voir dire examination to ask that question, no harm was done in denying the motion. That is good law, but suppose that we are limited to asking a particular juror if he personally contributed to that fund. He says no. Then it may be possible that his wife, his father or some member of his family contributed to it, and he knows it. We may have some prejudice there.

Perhaps one of the most interesting cases of recent years in Mississippi on this question of criminal discovery is *Bellew v. State*[25] that came up from the coast. It was argued before the supreme court that the lower court committed error in overruling the motion of the defense attorney for statements given before the trial to the sheriff. The supreme court held there was no error in that particular instance in overruling the motion, and said this: "We think there was no error in the action of the trial judge in refusing to order the district attorney to make available for inspection by the defendant's attorney statements by the state's witnesses to the prosecuting attorney before the trial." The court has held in several cases that the defendant is not entitled to a bill of particulars. The court said, in the absence of a statute so requiring, that the state was under no obligation to give the defendant the names of its witnesses. The court in New York held that in a criminal prosecution, documents and memoranda in the possession of the state or district attorney, not themselves admissible in evidence, were not subject to inspection by the defendant. We are getting back to the general rule there. Documents are not subject to inspection for the mere reason that they may supply a clue whereby evidence can be gathered. Documents to be subject to inspection must be evidence themselves. That seems to be the controlling rule here in Mississippi and throughout the ma-

[24]208 Miss. 236, 44 So. 2d 61 (1950).

[25]106 So. 2d 146 (Miss. 1958).

jority of the state courts: before the defendant will be entitled to discover or inspect, that which he seeks must first be evidence itself. Our court further held in this particular case: "We have found no case in our own state reports or in the reports of any other states whereby the lawyer or the trial judge made reversible error in refusing to grant the motion before trial to produce the statements given the district attorney." In that case we had one state witness who was examined at length concerning the statement that she gave to the sheriff, and the defense attorney asked for it for the purpose of cross-examining that particular witness. The court denied the motion because the statement itself was not used by the state to question that witness or refresh his memory.

Now we come over the case of *Sanders v. State*.[26] In *Sanders* the supreme court held that a motion should be granted to produce, and because the trial judge did not sustain the motion, reversed that decision. The accused was charged with having killed a man, and the accused had made certain alleged confessions to the county attorney or the district attorney in a conference at which a tape recording was made of that conversation. When the sheriff took the stand and testified about this alleged confession, the defendant moved for a production of the tape recording so that he might have an opportunity to cross-examine the sheriff, or to introduce it as evidence. The trial judge overruled it. The supreme court held that the defendant was entitled to it, that it was necessary, that it was material evidence; and while that particular decision was not based entirely on *Mississippi Code* Section 1659, it was based primarily upon a rule pertaining to a confession that when part of it is introduced, all of it should be introduced to explain the entire conversations between the parties.

There is one other matter of discovery, and that is the right to interview the state's witnesses before the trial. Ordinary this right should be granted to the defendant. Our court has held he is entitled to that, particularly in a capital case.

Generally speaking, the rule is that when we want to discover anything in the possession of the state, it must be admissible, material evidence in the case.

MR. FINCH:

Mr. Cunningham has dealt completely with the subject of criminal discovery. We have had very few decisions on the subject. I want to get off that subject just a little bit.

Speaking of the tape recording, a few days ago we were trying a case of bribery in Forrest County involving a district attorney in south Mississippi. We had taken a tape recording of the accused's statements over the telephone. We didn't exactly tap the phone; we just used the pickup mike

[26]237 Miss. 772, 115 So. 2d 145 (1960).

on the receiver, and we got a rather interesting conversation. I didn't intend to use it in evidence, but counsel for the accused filed a petition in the federal district court seeking to enjoin the district attorney, sheriff and county prosecutor from using that tape recording alleging that it violated the federal rule. Judge Mize dismissed the petition, holding that the federal court had no jurisdiction over the state court. I did not use the tape anyhow, but that may or may not open up new avenues wherein the accused seeks injunctive relief in the federal court because of violation of a federal rule in a state court. It is interesting to note that this question, use of telephone conversations recorded on tape or wire or any other mechanical device, has not been passed on in Mississippi. So I am looking for some new law, that is, the right to use a tape recorder on a telephone conversation.

I call your attention again to the particular section dealing with criminal discovery, *Mississippi Code* Section 1659. I look forward to the use of this statute. You know it can be used by the state, as I understand it, as well as the accused.

CODE OF TRIAL CONDUCT*

PREAMBLE

Lawyers who engage in trial work have a specific responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American Bar Association has promulgated Canons of Professional Ethics for the legal profession as a whole. The American College of Trial Lawyers, because of its particular concern for the improvement of litigation proceedings and trial conduct of counsel, presents this Code of Trial Conduct for trial lawyers, not to supplant, but to supplement and stress certain portions of the Canons of Professional Ethics. Generally speaking, the purposes and objectives of this Code are embodied in the following considerations:

To his client, the lawyer owes undivided allegiance, the application of the utmost of learning, skill and industry, and the employment of all honest and appropriate means within the law to protect and enforce legitimate interests. In the discharge of this duty, the lawyer should not be deterred by any real or fancied fear of judicial disfavor, or public unpopularity, nor should he be influenced directly or indirectly, by any considerations of self-interest.

To opposing counsel, the lawyer owes the duty of courtesy, candor in the pursuit of the truth, cooperation in all respects not inconsistent with his client's interests and scrupulous observance of all mutual understandings.

To the office of judge, the lawyer owes respect, diligence, candor and punctuality, the maintenance of the dignity and independence of the judiciary, and protection against unjust and improper criticism and attack.

To the administration of justice, the lawyer owes the maintenance of professional dignity and independence and conformity to the highest principles of professional rectitude, notwithstanding the desires of his client or others.

This Code expresses only minimum standards and should be construed liberally in favor of its fundamental purpose, consonant with the fiduciary status of the trial lawyer, and so that it shall govern all situations whether or not specifically mentioned herein.

1. ACCEPTANCE OF EMPLOYMENT IN CIVIL CASES.

In civil litigation, the lawyer should decline to prosecute a cause or assert a defense obviously devoid of merit, or which is intended merely to inflict harassment or injury, or to procure an unmerited settlement, or in which he, his firm or associates have conflicting interests.

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*Adopted by American College of Trial Lawyers

2. CONTINUANCE OF EMPLOYMENT IN CIVIL CASES.

After acceptance of employment the lawyer, unless discharged, should diligently conduct the cause to an expeditious conclusion. He may not withdraw except at a time or in circumstances when the withdrawal will not adversely affect the interests of the client. He may withdraw at any time with the consent of the client or with the approval of the court if a procedure for obtaining approval exists, or if his continuance in the representation of the client will involve his knowing participation in the perpetration of a fraud. Upon withdrawal after receipt of retainer, the lawyer should refund such portion thereof as has not been earned.

3. EMPLOYMENT IN CRIMINAL CASES.

Every person accused of crime has a right to a fair trial, including persons whose conduct, reputation or alleged violations may be the subject of public unpopularity or clamor. This places a duty of service on the legal profession and, even though the lawyer is not bound to accept particular employment, requests for service in criminal cases should not lightly be declined or refused merely on the basis of the lawyer's personal convenience or opinion concerning the guilt of the accused, or repugnance to the accused or to the crime charged.

4. CONDUCT OF CRIMINAL CASES.

(a) Having accepted employment in a criminal case, the lawyer's duty, regardless of his personal opinion as to the guilt of the accused, is to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence, to raise all valid defenses and, in case of conviction, to present all proper grounds for probation or mitigation of punishment. A confidential disclosure of guilt alone does not require a withdrawal from the case. However, after a confidential disclosure of facts clearly and credibly showing guilt, the lawyer should not present any evidence inconsistent with such facts. He should never offer testimony which he knows to be false.

(b) The crime charged should not be attributed to another identifiable person unless evidence introduced or interferences warranted therefrom raise at least a reasonable suspicion of such person's probable guilt.

(c) The prosecutor's primary duty is not to convict but to see that justice is done. Credible evidence that might tend to prove the accused's innocence should not be suppressed.

5. ACQUIRING INTEREST IN LITIGATION.

A lawyer should never purchase or otherwise acquire, directly or indirectly, any interest in the subject matter of the litigation which he

is conducting, provided, however, that nothing herein shall prohibit a just and reasonable contingent fee contract.

6. LAWYER AS WITNESS.

When a lawyer knows, prior to trial, that he will be a necessary witness, except as to merely formal matters such as identification or custody of a document or the like, neither he nor his firm nor associates should conduct the trial. If, during the trial, he discovers that the ends of justice require his testimony, he should, from that point on, if feasible and not prejudicial to his client's case, leave further conduct of the trial to other counsel. If circumstances do not permit withdrawal from the conduct of the trial, the lawyer should not argue the credibility of his own testimony.

7. PERSONAL EXPERIMENTS.

A lawyer should never conduct or engage in experiments involving any use of his own person or body except to illustrate in argument what has been previously admitted in evidence.

8. DISCRETION IN COOPERATING WITH OPPOSING COUNSEL.

The lawyer, and not the client, has the sole discretion to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments and admission of facts.

9. RELATIONS WITH OPPOSING COUNSEL.

(a) A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom. When he knows the identity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed.

(b) A lawyer should avoid indulgence in disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients. He should abstain from any allusion to personal peculiarities and idiosyncracies of opposing counsel.

10. WITNESSES.

(a) A lawyer should thoroughly investigate and marshal the facts. Subject to the provisions of Paragraph 11 hereof, he may properly

interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of the opposing counsel or party. He should avoid any suggestion calculated to induce any witness to supress evidence or deviate from the truth. He should avoid taking any action calculated to secrete a witness. However, except when legally required, it is not his duty to take affirmative action to disclose any evidence or the identity of any witness.

(b) A lawyer should not participate in a bargain with a witness either by contingent fee or otherwise as a condition of his giving evidence, but this does not preclude the payment of reasonable and non-contingent compensation for actual loss of time and expenses of persons who cannot afford to attend or will not appear and testify for the statutory fees; nor does it preclude payment of non-contingent fees to expert witnesses.

(c) A lawyer may advertise for witnesses to a particular event or transaction but not for witnesses to testify a particular version thereof.

(d) A lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing ligigants, or ask any question intended only to insult or degrade the witness. He should never yield, in these matters, to suggestions or demands of his client or allow any malevolence or prejudice of the client to influence his actions.

(e) A lawyer should not ask questions which affect the witness's credibility only by attacking his character, except those encompassed in recognized impeachment procedures.

11. COMMUNICATIONS WITH OPPOSITE PARTY.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. He should avoid everything that might tend to mislead a party not represented by counsel, and he should not undertake to advise him.

12. RELATIONS WITH THE JUDICIARY.

A lawyer should never show marked attention or unusual hospitality to a judge, uncalled for by the personal relations of the parties, He should avoid anything calculated to gain or having the appearance of gaining special personal consideration or favor from a judge.

13. TRIAL CONDUCT TOWARD JUDGE.

(a) During the trial, the lawyer should always display a dignified and respectful attitude toward the judge presiding, not for the sake of his person, but for the maintenance of respect for and confidence

in the judicial office. It is both the right and duty of the lawyer fully and properly to present his client's cause and to insist on an opportunity to do so. He should vigorously present all proper arguments against rulings he deems erroneous and see to it that a complete and accurate case record is made. In this regard, he should not be deterred by any fear of judicial displeasure or even punishment. The lawyer, regardless of fear, threat or imposition of punishment, should not reveal the confidences of his client.

(b) A lawyer should not discuss a pending case with the judge without the opposing lawyer's presence, unless, after notice, or request, the opposing lawyer fails or refuses to attend and the judge is so advised.

(c) Except as provided by rule or order of court, a lawyer should never deliver to the judge any letter, memorandum, brief, or other written communication without concurrently delivering a copy to opposing counsel.

(d) Subject to the foregoing, a lawyer may advise the judge of any reason for expediting or delaying the decision.

14. JURY.

(a) A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, such as fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like. Before and during the trial, he should avoid conversing or otherwise communicating with a juror on any subject whether pertaining to the case or not.

(b) A lawyer should disclose to the judge and opposing counsel any information of which he is aware that a juror or a prospective juror has or may have any interest, direct or indirect in the outcome of the case, or is acquainted or connected in any manner with any lawyer in the case or any partner or associate or employee of the lawyer, or with any litigant, or with any person who has appeared or is expected to appear as a witness, unless the judge and opposing counsel have previously been made aware thereof by voir dire examination or otherwise.

(c) It is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge.

(d) Before the jury is sworn to try the cause, a lawyer may investigate the prospective jurors to ascertain any basis for challenge, provided there is no communication with them, direct or indirect, or with any member of their families.

(e) A lawyer should, immediately upon his discovery thereof, make full disclosure to the court of any improper conduct by any person toward the jury or any member thereof.

15. COURT ROOM CONDUCT.

(a) In the voir dire examination of the jury, a lawyer should not state or allude to any matter not relevant to the case or which he is not in position to prove by admissible evidence.

(b) A lawyer should not state as fact in his opening statement any matter unless he has reason to believe that it will be substantiated by the evidence.

(c) A lawyer should never misstate the evidence or state as fact any matter not in evidence, but otherwise has the right to argue in the manner he deems effective, provided his argument is mannerly and not inflammatory.

(d) A lawyer should not include in the content of any question the suggestion of any matter which is obviously inadmissible.

(e) A question should not be interrupted by an objection unless the question is then patently objectable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.

(f) A lawyer should conduct the voir dire examination and the examination of all witnesses either from the counsel table or other suitable distance except when handling documentary or physical evidence or when a hearing impairment or other disability requires that he take a different position.

(g) In all cases in which there is any doubt about the propriety of any disclosure to the jury, requests should be made for leave to approach the bench and to obtain a ruling out of the jury's hearing, either by making an offer of proof or by propounding the question and obtaining an immediate ruling.

(h) A lawyer should not assert in argument his personal belief in the integrity of his client or of his witnesses or in the justice of his cause, as distinct from a fair analysis of the evidence touching those matters.

(i) A lawyer should not engage in exchanges of banter, personalities, argument or controversy with opposing counsel. His objections, requests and observations should be addressed to the judge.

16. COURT ROOM DECORUM.

(a) A lawyer should rise when addressing, or being addressed by, the judge, except when making brief objections or incidental comments.

(b) While the court is in session a lawyer should not smoke, assume an undignified posture, or, without the judge's permission, remove his coat in the court room. He should always be attired in a proper and dignified manner, and abstain from any apparel or ornament calculated to attract attention to himself.

17. PUNCTUALITY AND EXPEDITION.

(a) A lawyer should be punctual in all court appearances and, whenever possible, should give prompt notice to the court and to all other counsel in the case, of any circumstances requiring his tardiness or absence.

(b) A lawyer should make every reasonable effort to prepare himself fully prior to court appearance. He should promptly inform the court of any settlement, whether partial or entire, with any party, or the discontinuance of any issue.

(c) A lawyer should see to it that all depositions and other documents required to be filed are filed promptly, should stipulate in advance with opposing counsel to all non-controverted facts, should give opposing counsel, on reasonable request, an opportunity in advance to inspect all non-impeaching, evidence of which the law permits inspection, and, in general, should do everything possible to avoid delays and to expedite the trial.

18. CANDOR AND FAIRNESS.

(a) The conduct of the lawyer before the court and with other lawyers should at all times be characterized by candor and fairness.

(b) A lawyer should never knowingly misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or, with knowledge of its invalidity, cite as authority a decision that has been vacated or over-ruled, or a statute that has been repealed, or in argument assert as a fact that which has not been proved, or, in those jurisdictions in which a side has the opening and closing arguments, mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

(c) A lawyer should be extraordinarily careful to be fair, accurate and comprehensive in all ex parte presentations and in drawing or otherwise procuring affidavits.

(d) A lawyer should not offer evidence which he knows is inadmissible, and he should not endeavor to get the same before the jury in any manner. Neither should he include in an argument, addressed to the court, remarks or statements intended improperly to influence the jury or the public.

(e) A lawyer should not propose a stipulation in the jury's presence unless he knows or has any reason to believe the opposing lawyer will accept it.

(f) A lawyer should never employ dilatory tactics of any kind to procure more fees.

(g) A lawyer should never file a pleading or any other document

which he knows to be false in whole or in part or which is intended only for delay.

19. ADVERSE AUTHORITIES.

A lawyer should not attempt to mislead the court by citations of authorities he knows have been over-ruled or distinguished.

20. PUBLICATIONS RE PENDING LITIGATION.

A lawyer should not publish, cause to be published, or aid or abet in any way, directly or indirectly, the publication in any newspaper or other documentary medium, or by radio, television or other device of any material concerning a case on trial or any pending or anticipated litigation, calculated or which might reasonably be expected to interfere in any manner or to any degree with a fair trial in the courts or otherwise prejudice the due administration of justice. If extreme circumstances of a particular case require a statement to the public, it should not be made anonymously and no reference to the facts should go beyond quotation from the records and papers on file in court or other official documents, and no statement should be made which indicates intended proof or what witnesses will be called, or which amounts to comment or argument on the merits of the case.

21. DISCOVERY OF IMPOSITION OF DECEPTION.

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court, a party, or other counsel, he should promptly endeavor to rectify it.

22. APPLICABILITY.

This Code of Trial Conduct applies to all lawyers, whether engaged in private practice or public employment.

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STUDENT COMMENTS

INSANITY AS A DEFENSE IN CRIMINAL CASES IN MISSISSIPPI

Introduction

Insanity is recognized as a defense to crime in nearly every civilized country in the world. The reason for this is quite obvious. One of the essential elements in every crime is the mens rea, the criminal intent; and this criminal intent cannot be found in a person who is subject to a mental disease or defect.[1] In Mississippi insanity has always been a defense to any crime except murder; and insanity was a defense to murder until 1928 and became valid as a defense to murder once again in 1931. The Legislature, in 1928, passed a statute that abolished insanity as a defense to murder. This statute was declared unconstitutional in 1931 in the case of *Sinclair v. State*.[2] The court said there that the defense of insanity is an inherent right and that a deprivation of that right violates the Mississippi Constitution.[3] The real importance of the availability of this defense is expressed in this passage from *Smoot on Insanity* that was quoted with approval by Justice Ethridge in his concurring opinion:

> Where the mind of the perpetrator is so diseased as to exclude the presence of an intent or animus in the commission of the crime in question, he should not be punished as a criminal. So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English-speaking countries, that it has become a part of the fundamental laws thereof, to the extent that a statute which attempts to deprive a defendant of the right to plead it will be unconstitutional and void.

Since 1931 the defense of insanity has been available in Mississippi in every type of criminal action.

As psychiatrists and psychologists learn more about the human mind, the defense of insanity will become increasingly important. Today there are many tests that may be given a person in an effort to determine whether he is insane. These tests, coupled with the increased effectiveness of the other areas of psychology, mean that the courts are able to get more accurate and more reliable medical evidence of a defendant's sanity or insanity. This also means that additional types of mental

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[1] "A person, in the estimation of the law, to be capable of the commission of a crime, must have intelligence enough to have a criminal intent and purpose. . . ." Bovard v. State, 30 Miss. 600 (1856).

[2] 161 Miss. 142, 132 So. 581 (1931).

[3] "No persons shall be derived of life, liberty, or property except by due process of law." Miss. Const. art. 3, § 14.

diseases and disorders will be discovered and will be placed before the courts as a legitimate defense to a crime committed by a person so affected. Thus, it seems appropriate that one should pause for a moment and examine the status of the defense of insanity as it exists in Mississippi today so that we may cope with the medical advances and the legal problems of the future.

There is considerably more to insanity as pleaded in a criminal case than the usual defense of insanity at the time of the act. A defendant may be perfectly sane when he commits a crime and become insane afterwards. Circumstances such as this are usually referred to as "present insanity," which means that the defendant is insane at the time a particular plea is being filed. This situation is separate and distinct from that of pleading insanity at the time of the act. The standards for determining insanity are different, as are the procedural steps necessary to present the problem to the court. Little attention has been given to this area, and thus there seems to be confusion on the bench and in the bar as to the status of the law in the area. This can be seen in some of the confusing procedures that have been used and the equally confusing opinions that have been written in reply. In an effort to clarify this situation, the first part of this comment will be devoted to to an examination of the law of "present insanity," when it can be pleaded and how. An examination will follow of some of the rules of evidence that seem either to have a peculiar twist or to be altered when insanity is pleaded. The remainder of the articles will be devoted to a discussion of the test of responsibility that is applied in Mississippi when a defendant pleads insanity at the time of the act and an evaluation of that test.

I. "Present Insanity" Pleaded

The question of present insanity, as opposed to insanity at the time of the act, may arise at various stages of the criminal proceeding itself and will have a profound effect upon its outcome. The first time that present insanity can be pleaded is at the time of arraignment. It is the general rule that a person who is insane at the time of arraignment should not be permitted to plead to the charge until his reason is restored because he is incapable of understanding the charge against him. Mississippi, it would appear, follows this general rule; but the court is strict as to the way in which the question of the present insanity of the defendant is brought to the court's attention. Thus, in the case of *Skinner v. State*[4] it was implied that the defendant had a right to raise the question of insanity at the time of arraignment and to state that he was not capable of making a plea. The trial court overruled the motion on procedural grounds; and this procedural ruling was sustained in the supreme court. The question of correct procedure will be discussed later in con-

[4]198 Miss. 505, 23 So. 2d 501 (1945).

nection with raising the question of insanity at the time of the trial since it is the same under both circumstances; suffice it to say at this juncture that one may plead insanity at the time of arraignment, and if the plea is presented properly, the defendant will not have to plead until he regains his reason.[5]

It is well established in Mississippi that a person who is presently insane cannot be tried.[6] This rule has gained such favor in the courts of the state that it has been held that the trial of a person while he is insane, while his mind is so clouded that he cannot make a rational defense, "is a denial of due process and contrary to public policy."[7] Each time the defendant is returned for trial after having been declared insane at the time of an earlier trial the question of his sanity must be redetermined. The fact that the trial has been set aside once before does not fully comply with the rule; but the defendant's ability to make a rational defense must be tested and found to be present before there can be a trial on the merits.[8]

A person who has been adjudged insane in a proceeding in the chancery court and committed by that court to a hospital for the insane cannot be taken from that custody to be tried for any crime.[9] This rule is also based upon the theory that the person so committed was and remains under the exclusive jurisdiction of the chancery court; and the circuit court cannot take the person away from that jurisdiction. The rationale just mentioned has led to the supreme court's refusal to permit a writ of lunacy from a chancery court to stop criminal proceedings that are already under way in the circuit court[10] on the ground that the circuit court has exclusive jurisdiction which cannot be altered by an-

[5]See Williams v. State, 205 Miss. 528, 39 So. 2d 3 (1949) where the correct procedure was used and the defendant was found to be insane. He was then committed to the State Insane Hospital where he remained until his recovery at which time he was once again brought before the court for trial. He pleaded insanity again, but the court ruled that the defendant appeared sane and required him to plead. When the defendant stood mute the court entered a plea of "not guilty" for him, and the trial proceeded. This was held to be correct by the supreme court.

[6]Howie v. State, 121 Miss. 197, 83 So. 158 (1919).

[7]Williams v. State, 205 Miss. 528, 39 So. 2d 3 (1949).

[8]Hawie v. State, 125 Miss. 589, 88 So. 167 (1921). Note: the case cited in note 6 *supra* as Howie v. State is an earlier opinion of this *Hawie* case. Evidently there has been a typographical error in the style of the case in the report of it in the Southern Reporter. Although the name is spelled differently in the two reports of the case, it involves the same parties.

[9]Mabry v. Hoye, 124 Miss. 144, 87 So. 4 (1921).

[10]Hawie v. Hawie, 128 Miss. 473, 91 So. 131 (1922) where the defendant's conviction was reversed and remanded by the supreme court and before the second criminal trial could get under way this action for a writ of lunacy was begun. The court held that the writ of lunacy could not stop the criminal proceeding. The defendant's only recourse was to satisfy the jury in the circuit court of his insanity. See also Ratcliff v. State, 201 Miss. 259, 29 So. 2d 321 (1947).

other court. So long as the defendant is in custody under the order of the circuit court, a writ of lunacy from the chancery court will have no effect even if the actual trial has not yet begun.[11]

When it becomes evident to the defendant's attorney, either before arraignment or before the trial, that the defendant is insane and incapable of making a rational defense, the attorney should file a suggestion of present insanity so as to avail himself of a preliminary hearing on the question of insanity. The Mississippi Supreme Court does not seem to have laid down in any one place specific procedural rules for such a hearing, but it has consistently held that a preliminary hearing "is proper, and must be had."[12] The first step that seems necessary is for the defendant or his counsel to file a suggestion of present insanity with the trial court. This suggestion may be oral or written,[13] but it must be accompanied by affidavits or the offer of witnesses who will testify to the defendant's present insanity.[14]

The hearing is the second step, and it comes in two stages. First, the trial judge must rule on the motion or the suggestion of insanity. The affidavits and offer of witnesses are examined by the trial judge, and sometimes a hearing prior to the preliminary hearing may be had.[15] This is because the trial judge must feel that there is at least a "probability"[16] or a "reasonable probability"[17] that the defendant is incapable of making a rational defense[18] before the question can be submitted to

[11]Skinner v. State, 198 Miss. 505, 23 So. 2d 501 (1945).

[12]See Dunaway v. State, 157 Miss. 615, 128 So. 770 (1930).

[13]See Carter v. State, 199 Miss. 871, 25 So. 2d 470 (1946) where the court said that in an earlier case they had "upheld the right of a defendant charged with crime orally to suggest to the court that he may be insane and that motion thereon may be orally made. . . ." Most of the cases in this area have factual situations in which the motion was written and filed. This procedure has been tacitly approved by the supreme court and is probably the safest way of doing it.

[14]This seems to have been required first in Davis v. State, 151 Miss. 883, 119 So. 805 (1929). See also Carter v. State, 199 Miss.871, 25 So. 2d 570 (1946) and Skinner v. State, 198 Miss. 505, 23 So. 2d 501 (1945).

[15]See, *e.g.*, Olsen v. State, 224 Miss. 226, 79 So. 2d 841 (1955) where a hearing was held before the judge to help him decide whether to submit the question to a jury. This case is also interesting because the trial judge permitted the defense attorney to testify as to the difficult time he was having in trying to talk with the defendant. See also the very interesting case of Shipp v. State, 215 Miss. 541, 61 So. 2d 329 (1952) where some seventeen doctors testified before the judge. Every one of them stated that the defendant was insane; and yet the judge did not feel that a reasonable probability of the defendant's insanity had been created and he refused a preliminary hearing. The supreme court reversed.

[16]Eslick v. State, 119 So. 2d 355 (Miss. 1960); Olsen v. State, 224 Miss. 226 79 So. 2d 841 (1955).

[17]Robinson v. State, 223 Miss. 70, 77 So. 2d 265 (1955); Shipp v. State, 215 Miss. 541, 61 So. 2d 329 (1952).

[18]Note that the test in this type of hearing is not whether the defendant is able to distinguish right from wrong, but whether the defendant is able to make a rational defense.

a jury. Second, when the trial judge is satisfied that there is a probability that the defendant is incapable of making a rational defense he *must*[19] submit the question preliminarily to a jury. The evidence is then put on before the special jury and a verdict is reached. If the defendant is found to be sane, the trial on the merits or the arraignment proceeds; if the defendant is found to be insane, the trial on the merits or the arraignment is postponed until he regains his faculties.

The cases of *Eslick v. State*,[20] *Robinson v. State*,[21] and *Shipp v. State*[22] held that the trial judge *must* submit the question of the defendant's present insanity preliminarily to a jury. However, there have been a few times when the trial judge has submitted the question at the same time that the question of the defendant's guilt and the question of his insanity at the time of the alleged act were submitted.[23] This would seem to be erroneous when one considers the reason for having preliminary hearings;[24] yet whether it is reversible error is not clear even today. The problem came up first in the case of *Davis v. State*,[25] and the court refused "to approve or disapprove the procedure adopted by the lower court." This fact was obviously not noticed by the court in the case of *Williams v. State*,[26] because the *Davis* case was cited in support of the proposition that all three issues could be submitted to the same jury and that there would not be error if the jury finds the defendant sane and guilty. Taken together, these two cases seem to say that if the defendant is found to be sane, the submission of all three issues is not error; but if the defendant is found to be insane, it is error. Of course this is ridiculous because the judge will not know at the time he submits the three issues what the verdict will be. The case of *Pace v. State*[27] also fell into the trap of assuming that the *Davis* case stated a rule with regard to this problem; but it rejected the *Davis* case because the verdict of sanity in the *Pace* case was held to be contrary to the great weight of the evidence. That decision completes the circl of confusion. The only rule that can be gleaned from the three opinions is that the trial judge must have extra-

[19]Eslick v. State, 119 So. 2d 355 (Miss. 1960); Robinson v. State, 223 Miss. 70, 77 So. 2d 265 (1955); Shipp v. State, 215 Miss. 541, 61 So. 2d 329 (1952).

[20]119 So. 2d 355 (Miss. 1960).

[21]223 Miss. 70, 77 So. 2d 265 (1955).

[22]215 Miss. 541, 61 So. 2d 329 (1952).

[23]Pace v. State, 218 Miss. 614, 67 So. 2d 521 (1953); Williams v. State, 205 Miss. 528, 39 So. 2d 3 (1949); Davis v. State, 151 Miss. 883, 119 So. 805 (1929).

[24]The reason is succinctly stated in Pace v. State, 218 Miss. 614, 67 So. 2d 521 (1953) as follows: "He [a defendant] is entitled to have a jury pass upon this important issue [of his sanity at the trial] not unduly influenced by the prejudicial testimony that may be developed upon a trial of the issue of his guilt or innocence of the crime charged."

[25]151 Miss. 883 119 So. 805 (1929).

[26]205 Miss. 528, 39 So. 2d 3 (1949).

[27]218 Miss. 614, 67 So. 2d 521 (1953).

sensory powers if he wishes to submit the three issues together. He must be able to look into the future to see what verdict the jury will reach. Then he may submit the three issues together without fear of reversal if his crystal ball tells him that the verdict will be "sanity", but he should submit the issue of sanity at the time of the trial separately if it tells him that the verdict will be "insanity."

Because of the confusion that these three opinions create in this area[28] they should be ignored. There are other decisions that cover the same material in a logical, rational manner. First, one should turn to the case of *Dunaway v. State*[29] to learn that if the question of insanity is raised in time, a *preliminary hearing* "must be had." This, of course, implies that if the question of sanity arises it should *never* be submitted to the jury at the same time that the other issues are submitted. Second, if the question of insanity is not raised until the trial on the merits has already begun, there is ample authority[30] to support the trial judge's stopping the trial on the merits "and submit to the jury, *preliminarily*" (Emphasis added.) the issue of the defendant's present sanity. Thus, if there is a question of the defendant's present sanity, no matter when it arises, the trial court is obligated to have the question settled preliminarily by a jury; the trial judge certainly should not submit such a question to the jury with the other issues. If, at the time of the trial, the defendant specifically denies that he is relying upon an allegation that he is insane at the time of the trial, but states that he is relying solely upon the defense of insanity at the time of the actus reus, then he has waived the right to a preliminary hearing on that matter.[32]

In the 1960 session of the Mississippi Legislature a bill[33] was passed that empowers the trial judge in any criminal action "in which the mental condition of a person indicted for a felony is in question" to order, in vacation, that person to submit to a mental examination by a competent psychiatrist. The stated purpose of the bill is "to determine his [the defendant's] ability to make a defense"; so evidently it was meant to apply only when present insanity is being alleged and not when insanity at the time of the actus reus is being alleged. The bill does not mention the preliminary hearing in any way nor does it mention whether or not the findings of the psychiatrist are to be binding on the court. At the time

[28]Note that these opinions state valid propositions of law on points other than this particular question under discussion. In other areas the opinions would be valid authority for the statements for law there made and have been cited as authority in this article; but in this area they seem to conflict with what the law is and confuse the issue unnecessarily.

[29]157 Miss. 615, 128 So. 770 (1930).

[30]Williams v. State, 205 Miss. 528, 39 So. 2d 3 (1949); Carter v. State, 198 Miss. 523, 21 So. 2d 404 (1945); Howie v. State, 121 Miss. 197, 83 So. 158 (1919).

[31]Williams v. State, 205 Miss. 528, 39 So. 2d 3 (1949).

[32]Eslick v. State, 119 So. 2d 355 (Miss. 1960).

[33]Miss. Laws 1960, House Bill 668.

this paper is being written the act has not even taken effect, so any observations are pure conjecture. However, it would seem that the importance of the preliminary hearing has been too deeply ingrained in our judicial system to conclude that this brief bill overrules the requirements for a preliminary hearing before a jury and makes the findings of the psychiatrist binding on the court when the bill does not even mention the hearings. After examination of the cases requiring the preliminary hearings and setting out the procedure, one must conclude that this new bill merely provides the court with an additional source of evidence. This conclusion is given weight by the fact that the court in the case of *Gambrell v. State*[34] mentioned the bill as merely being "in connection" with the "appropriate steps" already in existence which the trial court would take upon the filing of a suggestion of present insanity.

It is possible, although our courts hold not probable,[35] that the present insanity of a defendant will not be discovered until after the trial and conviction. The procedural problem of what to do and how to do it then arises. "The error is one that could not have been availed of during the term of court at which the defendant was convicted. There is, therefore, no remedy by appeal."[36] The remedy of a writ of error coram nobis was used successfully in the case of *Howie v. State*.[37] However the later case of *Mitchell v. State*[38] has expressly overruled that portion of the *Howie* case and held specifically that "the issue of insanity at the time of the commission of the crime as well as at the time of the trial cannot be made the subject of a petition for a writ of error coram nobis." In *Stewart v. State*[39] the court refused to grant a new trial on the grounds of newly discovered evidence indicating that the defendant was insane at the time of the trial because that was held to be a condition that the attorneys should have ascertained before the trial. The situation as it stands in Mississippi today was succinctly stated in 121 *American Law Reports* at page 268: "It is not clear what remedy, if any, would be available where the defendant's insanity is not discovered until after the term of court at which he was convicted . . . ."

An interesting situation was presented recently in the case of *Lang v. State*[40] where the defendant became insane after conviction. The

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34120 So. 2d 758 (Miss. 1960).

35Separate opinion of Smith, C.J. in Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937): "I think it can be safely said that it is hardly possible for a defendant's counsel, in discussing his case with him, as he must do in order to prepare his defense, not to discover the fact, if such exists, that the defendant is mentally incapable of remembering and advising him of the facts bearing on and necessary to his defense."

36See Howie v. State, 121 Miss. 197, 83 So. 158 (1919).

37121 Miss. 197, 83 So. 158 (1919).

38179 Miss. 814, 176 So. 743 (1937).

39203 Miss. 295, 33 So. 2d 787 (1948).

40199 So. 2d 609 (Miss. 1960).

sentence was set aside by the lower court, but the conviction was retained. The defendant then tried to appeal, but the supreme court refused to allow an appeal because the absence of a sentence kept the judgment from being final; Section 1945 of the *Mississippi Code Annotated* (1942) permits appeals to the supreme court only from a "final judgment in the court below." If a defendant were to go insane between the giving of the verdict and the giving of the sentence, the sentence could not be given. Following the decision in the *Lang* case no appeal could be taken until the defendant regained his sanity and was sentenced.

As a general rule in Mississippi no person who has become insane since his trial should be punished while he is insane.[41] Thus, if a person were sentenced to a term of years in prison, or even for life, the circuit court in which he was convicted could have the person sent to a hospital for the insane. The time spent in the hospital would probably not be included in a computation of the length of time served by the prisoner. This probem is even more serious when the prisoner has become insane since his trial and is to be executed. Mississippi has consistently held that a person who is insane should not be executed.[42] However, for the prisoner to avail himself of this means of postponing execution, he must show that the insanity arose subsequent to conviction, especially where the defendant's insanity was examined at the trial, resulting in the jury's finding that the defendant was, in fact, sane.[43] That seems to be the only nonprocedural requirement imposed by the supreme court upon this question of insanity after conviction.

There is no settled procedure for raising the issue. Although there appear to be no cases raising this question when the defendant was sentenced to serve a term of years, there are a few cases that deal with the problem when the defendant has been sentenced to be executed. The procedure for the latter situation will probably suffice in the former situation. *Mississippi Code Annotated* Section 2558 (1942), which applies specifically to persons awaiting execution, affords a statutory remedy — not an exclusive remedy[44] — by which execution may be stayed.

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[41]Shipp v. State, 215 Miss. 541, 61 So. 2d 329 (1952). See also the statement from 10 Enc. P. & P. 1218 that was quoted with approval in the case of Hawie v. State, 125 Miss. 589, 88 So. 167 (1921): "No insane person shall be ...punished for any crime or offense, while he continues in that state."

[42]See, *e.g.*, Shipp v. State, 215 Miss. 541, 61 So. 2d 329 (1952); Musslewhite v. State, 215 Miss. 363, 60 So. 2d 807 (1952). The following cases intimate the same thing: Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937); Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931); Lewis v. State, 155 Miss. 810, 125 So. 419 (1930); Howie v. State, 121 Miss. 197, 83 So. 158 (1919).

[43]Lewis v. State, 155 Miss. 810, 125 So. 419 (1930).

[44]See Musslewhite v. State, 215 Miss. 363, 60 So. 2d 807 (1952). See also Lewis v. State, 155 Miss. 810, 125 So. 419 (1930) which interprets in the same way the section of Hemingway's 1927 Code that is exactly like the present Section 2558.

Although the writ of error coram nobis may no longer be used to raise the issue after the trial of insanity at the time of the trial or at the time of the crime, the case of *Mitchell v. State*[45] stated that this procedure might be used if the insanity ocurred after conviction. Since the *Mitchell* case the Legislature has established a procedure for the use of the writ of error coram nobis.[46] A good example of the use of this statute may be found in the case of *Wheeler v. State*.[47] In that case the applicant, following the requirements of the statute, filled in the supreme court an application for permission to present to the trial judge a petition for a writ of error coram nobis because the applicant had become insane since his conviction. The court held that this was the correct procedure and held that the applicant must satisfy the supreme court that there is a "reasonable probability" that he is insane before that court will permit the applicant to get to the trial court. This is another way of obtaining the stay of execution because of the insanity of the convicted party. It must be mentioned, however, that the court has not looked with favor upon the writ of error coram nobis;[48] and that "the relief, for the granting of which the writ of error coram nobis lies, can be granted on a motion or petition."[49]

Because of the disfavor which the writ of error coram nobis has in the eyes of the court and because of the complexity of the procedure involved, it would be well to investigate alternative procedures. In the *Wheeler* case the writ of habeas corpus was tried, but the writ was refused because the applicant failed to comply with the statutory requirements.[50] The court also did its best to discourage anyone from requesting the habeas corpus writ first from the supreme court, but the writ is still available. Since the court has stated that it will entertain a simple motion or petition in such an instance as this, it seems unnecessary to attempt more complicated procedures; if any reader should feel that a simple motion or petition is not adequate, he may refer to 121 *American Law Reports* 267 for examples of procedures used in other states. The

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45179 Miss. 814, 176 So. 743 (1937): "It is only when the insanity has developed and become present since the trial that we leave the door open to suspend a judgment or sentence upon that issue [the granting of a writ of error coram nobis]..." Note that this makes no specific reference to limiting this to a situation involving an anticipated execution; so this method certainly could be used when the sentence is for a term of years.

46Miss. Code Ann. § 1992.5 (1956).

47219 Miss. 129, 70 So. 2d 82 (1954).

48"No writ of error coram nobis is necessary, as this court has more than once said; and if members of the bar ...would only remember and act on this, much trouble would be saved them and this court." Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937) quoted with approval in Lang v. State, 230 Miss. 147, 92 So. 2d 670 (1957).

49Carraway v. State, 163 Miss. 639, 141 So. 342 (1932) quoted with approval in Lang v. State, 230 Miss. 147, 92 So. 2d 670 (1957).

50Miss. Code Ann. §§ 2815 — 40, and especially § 2819 (1956).

supreme court has left the door open for the use of a variety of procedure used, if the issue involved is the applicant's life and a denial of cedure used, if the isue involved is the applicant's life and a denial of due process, the court will not require strict adherence to the technical niceties of pleading.[51]

II. Evidence

Proving that a person is sane or insane is an exceedingly difficult problem since insanity is a condition and not a thing. Insanity is not susceptible to the usual forms of proof, and there is the additional difficulty of measuring the extent of insanity once it is proven. Obviously the person most concerned cannot be relied on to provide much help, so resort must be had to an examination of the external manifestations of the defendant. All the infomation relative to the problem should be set forth, accompanied by scientific knowledge that will help in its interpretation. The question of the insanity vel non of an individual is essentially a factual one which should be decided by triers of fact, the jury.

Just as one enters a criminal proceeding with the presumption that he is innocent, one also enters a criminal proceeding with the presumption that he is sane.[52] Both presumptions are based on and were created out of common experience and public policy. This presumption of sanity applies primarily to the time of the commission of the alleged crime, but it is valid as to every other time in the defendant's life until the contrary is proven.

There is one exception to the presumption of sanity and that is the presumption of continuing insanity. The latter presumption arises when it is shown that the defendant was affected with a form of insanity prior to the time the alleged act was committed. Mississippi has narrowed this presumption by requiring that the insanity with which the defendant was afflicted must be of a general, habitual, permanent, chronic or continuing nature.[53] When this situation exists it is presumed that the defendant was still insane at the time of the alleged act, and it is incumbent upon the state to prove that the alleged act was done during a lucid

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[51]See Musslewhite v. State, 215 Miss. 363, 60 So. 2d 807 (1952) where the court refused to discuss whether the procedure used in getting the issue of the applicant's present insanity before the court was correct saying: "At the outset, we avoid any discussion as to the exact procedure here followed .... Where the issue involves due process, technical perfection of pleading must not be required and intricate niceties may not be allowed to control." *But see* Wheeler v. State, 219 Miss.129, 70 So. 2d 82 (1954) where a man's life was at stake and the court refused to grant a writ of habeas corpus because the application was not accompanied by the affidavit as required by statute.

[52]Gambrell v. State, 120 So. 2d 758 (Miss. 1960); Newcomb v. State, 37 Miss. 383 (1859).

[53]Ford v. State, 73 Miss. 734, 19 So. 665 (1896). See also 27 A.L.R.2d 121, 124.

interval. If, however, the defendant had had only temporary or even recurrent insanity at an earlier time instead of the permanent type, there is no presumption of continuing insanity.[54] On the contrary, the original presumption of sanity is relied upon, thus presuming that the alleged act was committed during a lucid interval. The state may rely upon the presumption of sanity in this type of situation, just as if the question of the defendant's insanity had never been raised.

The presumption of sanity may be repudiated so as to put in issue the question of the sanity vel non of the defendant. This question may arise from testimony presented by the state as well as by the defendant,[55] but the defendant usually raises the question at the outset of the proceedings. As this rule has developed, there has also developed the rule as to how much proof or what amount of rebuttal material – no matter what its source – is necessary to refute the presumption of sanity. This problem was first discussed by the High Court of Errors and Appeals and that court held[56] that a "mere probability of insanity cannot prevail over the presumption of sanity" and "that in order to establish a defense on the ground of insanity, it must be clearly proved." This seems to have imposed upon the defendant the task of presenting as much evidence in an attempt to get the question of insanity before the court for the first time as was required to be presented after the question was before the court in order to actually prove the defendant's insanity. The rule certainly was not a logical one, and fortunately is not in effect today. *Caffey* v *State*[57] states the rule that must be followed now: "The defendant is not required to 'establish his insanity,' but merely to raise by the testimony, a reasonable doubt as to his sanity, at the time of the commission of the alleged crime." Thus, it appears as if the rule that was rejected a century ago is now in effect. Certainly it is more logical to require the defendant merely to raise a doubt as to his sanity rather than to clearly prove his insanity, for once the insanity has been "clearly proved" so as to get the question before the court to rule on the defendant's insanity, the question would have already been decided in his favor in the process of getting the question before the court.

In a criminal proceeding the state must prove every material fact constituting the alleged offense. One of the essential elements to be proved is the criminal intent. Since a person who is legally insane is not capable of having a criminal intent, the state has the burden of proving that the defendant was sane at the time of the commission of the alleged act. If the question of the sanity of the defendant is not raised by either the parties or their evidence, the presumption that all persons are sane

[54]Ford v. State, 73 Miss. 743, 19 So. 665 (1896). See also 27 A.L.R.2d 121, 135.

[55]Waycaster v. State, 185 Miss. 35, 187 So. 205 (1939). Cases before and since this one have held the same way, but this opinion states the rule very well.

[56]Newcomb v. State, 37 Miss. 383 (1859).

[57]24 So. 315 (Miss. 1898).

fulfills all requirements imposed upon the state, and no proof need be given to show that the defendant was sane at the time. Once the presumption of sanity has been refuted, the state then has the burden of proving that the defendant was sane.[58] This burden of proof never shifts to the defendant.[59] Even if it is assumed that the defendant must raise the question of insanity if it is to be raised at all, it still must be conceded that the burden of proof rests on the state. In raising the question of insanity the defendant does not have to *prove* anything; he merely has to raise a reasonable doubt in the mind of the court or of the jury. Perhaps it could be said that under normal circumstances the defendant will be required to initiate the introduction of evidence of his insanity or will have to bring the import of such evidence to the attention of the court if it has already been introduced by the state, but the defendant will never have the burden of proof. That is imposed solely upon the state.

Because of the seriousness of the situation in criminal proceedings, the degree of proof that is required before the state has met its burden is very high. The state must prove its case beyond all reasonable doubt.[60] This means that the defendant need produce only that amount of evidence which would create a reasonable doubt in the mind of a juror in spite of the proof put on by the state.

"The defense of insanity opens a broad field of inquiry, and much evidence which would otherwise be incompetent is admissible. . . ."[61] This rule, first enunciated in 1890, has been followed consistently in Mississippi.[62] The reason for the rule is quite obvious. Insanity is a

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[58]This principle of law was first enunciated in the *Cunningham* case, when the court said: "Whenever the question of sanity is raised ... it desolves upon the State to remove it ..." and was followed recently in the case of Gambrell v. State, 120 So. 2d 758 (Miss. 1960).

[59]Williams v. State, 205 Miss. 528, 39 So. 2d 3 (1949). The lower court granted an instruction to the jury that stated that the burden of proving insanity "rests on the defendant." The supreme court held this to be reversible error because: "It will be noted that this instruction places on the defendant the burden of proving his insanity at the time of the commission of the offense. *The burden never shifts in a criminal case.*" (Emphasis added.)

[60]The cases that so hold are legion. A few are cited here to indicate the consistency of the acceptance of this rule: Russell v. State, 53 Miss. 367 (1876); Ford v. State, 73 Miss. 734, 19 So. 665 (1896); Waycaster v. State, 185 Miss. 35, 187 So. 205 (1939); Gambrell v. State, 120 So. 2d 758 (Miss. 1960).

[61]Kearney v. State, 68 Miss. 233, 8 So. 292 (1890).

[62]Denham v. State, 218 Miss. 423, 67 So. 2d 445 (1953) where the court stated: "But for the defense of insanity the admission of the evidence here complained of would have been error." However, if the court permits the defendant to put on evidence of his insanity and later excludes the evidence because it failed to raise a reasonable doubt as to the defendant's insanity, the court must also exclude any and all evidence introduced by the state in rebuttal; and failure to do so is error. Jones v. State, 97 Miss. 268, 52 So. 791 (1910).

mental condition which can be detected and measured only by the acts and appearance of the person affected. Thus the courts are anxious to have all the facts, even those that might under different circumstances appear too remote or circumstantial. This general rule is modified by the courts, however, by restricting the testimony to that which is absolutely necessary. The state of mind of the defendant must be proved by direct evidence of his acts, facial expressions, speech, etc. It cannot be proved by the defendant's reputation for insanity.[63]

The means of proving that the defendant was or was not insane are too numerous and varied to attempt a complete summary of them. There are, however, some types of proof that are used more than others; seven of the most important and prevalent are digested below. In examining them the reader should keep in mind the fact that no one of these, standing alone, will prove that a person is criminally irresponsible; it takes evidence of the existence of several before a jury will be warranted in finding that a defendant is insane.

A. *Physical appearance.* It is common knowledge that the condition and character of the mind is reflected in the physical appearance of an individual. Thus his physical appearance is material evidence of his sanity or insanity. When the plea of insanity has been entered, the appearance and conduct of the defendant while in the courtroom is some indication of his mental state and should be taken into consideration. In *Carter v. State*[64] counsel for the defendant was permitted to call attention to the physical appearance of the defendant who was sitting at the defense table in the courtroom. This was done by asking the witness who was on the stand questions relative to the defendant's appearance. A majority of the courts in the United States permit an attorney to make references during his closing argument to the defendant's appearance. The *Carter* case also held that it is the duty of the trial judge to observe the defendant even when insanity is not pleaded to make certain he is capable of making a rational defense.[65]

B. *Physical health.* Medical science has proved that a person's mental condition can be greatly affected by his physical health. In fact, there is one school of psychology that contends that all mental disorders have a pathological origin. For this reason it is material to introduce evidence of physical conditions that are not, in and of themselves, forms of insanity but that affect the mental condition of the defendant. Thus, evidence has been admitted that showed that the defendant had epileptic fits[66] or that the defendant received severe head injuries during wartime.[67]

63Williams v. State, 185 Miss. 449, 188 So. 316 (1939).

64198 Miss. 523, 21 So. 2d 404 (1945).

65See also Ratcliff v. State, 201 Miss. 259 29 So. 2d 321 (1947).

66See, *e.g.*, Hamburg v. State, 203 Miss. 565, 35 So. 2d 324 (1948).

67See, *e.g.*, Cates v. State, 171 Miss. 169, 157 So. 95 (1934).

C. *Acts and conduct.* Perhaps this is the most vivid of all the methods of proof, since everyone knows, or at least feels, that acts are expressions of the ideas that a person is having and since acts are the most obvious a person's manifestations of a mental disorder. The acts of which an insane person is capable are too numerous to mention; however, an attempt will be made to mention some of the more prevalent acts that have confronted the courts. Most will be indications that the defendant did not know right from wrong and was legally insane. If the defendant hides or tries to conceal his actions immediately prior to the commission of the act,[68] or if the defendant runs away immediately after the commission of the act,[69] the court has held this an indication that the defendant knew that he was doing wrong. Other indications of insanity are: the defendant tried to conceal his connection with the crime,[70] the defendant tried to conceal the fact of a crime,[71] the defendant knew to notify the law enforcement officers,[72] and especially if the defendant notified the authorities himself[73] Mississippi has never recognized the enormity of the crime as being indicative of the defendant's insanity;[74] and evidence that the defendant is excitable, emotional, or passionate[75] or had other minor peculiarities of conduct[76] does not prove that the defendant was insane. A very important limitation that has been imposed upon the general rule, which permits evidence of acts and conduct of the defendant to be admitted, is that evidence of acts and conduct of an incriminating nature, occurring since the defendant's confinement because of his being accused of the alleged act, is not admissible unless the defendant, being mentally capable of understanding, has been warned that anything that he might say or do may be used against him.

D. *Speech.* The confused, disjointed thoughts of an insane person are vividly brought to the attention of others by his speech. This type of proof may be availed of by putting the defendant himself on the stand or by producing testimony of other witnesses. The former method is not

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[68]Johnson v. State, 223 Miss. 56, 76 So. 2d 841 (1955).

[69]Temple v. State, 165 Miss. 808, 145 So. 749 (1933).

[70]Keeler v. State, 226 Miss. 203, 84 So. 2d 153 (1955). Tyler v. State, 199 Miss. 285, 24 So. 2d 740 (1946); Wood v. State, 197 Miss. 657, 20 So. 2d 661 (1945).

[71]West v. State, 218 Miss. 397, 67 So. 2d 366 (1953).

[72]Denham v. State, 218 Miss. 423, 67 So. 2d 445 (1953).

[73]Kearney v. State, 224 Miss. 11, 79 So. 2d 468 (1955).

[74]Burr v. State, 114 So. 2d (Miss. 1959); Singleton v. State, 71 Miss. 782, 16 So. 295 (1894): "Nothing suggests the doubt of his insanity, unless it is the enormity of his crime; and it would be unsafe to indulge a presumption of want of sanity from that alone . . . ."

[75]Garner v. State, 112 Miss. 317, 73 So. 50 (1916); Tidwell v. State, 84 Miss. 475 36 So. 393 (1904).

[76]Eatman v. State, 169 Miss. 295, 153 So. 381 (1934): "Peculiarities of conduct on occasions do not amount to proof of insanity, else, in the judgment of many men, most of the people, other than themselves, would be insane . . . ."

often used because it would tend to prove that the defendant was insane at the time of the trial rather than at the time of the alleged act. Thus, the more familiar method of introducing evidence of the speech of the defendant is the use of testimony of other witnesses. This is not objectionable as violative of the hearsay rule since the truth of the statements is not to be established; instead the mental condition of the defendant is to be established by showing that the defendant said the statements regardless of their truth. Not only is the manner in which the defendant spoke important; the content of the defendant's statements is equally important. It has been held that the statements of remorse indicate that the defendant knew that he had done wrong.[77] Statements made at the time of the alleged act have been given much weight as indicators of the defendant's mental condition at that time. Where the defendant spoke rationally[78] or made factually correct statements at the time of the alleged act,[79] it has been held that the defendant was sane to some extent.

E. *Writings.* Reasonable men may differ as to exactly what acts the defendant did, or what his physical appearance was, or even what the defendant said and how he said it; but written expressions of the defendant speak for themselves and speak accurately. When documents written by the defendant are introduced, the jury can see for themselves exactly what the defendant said without conflicting testimony. Documents written prior to the time the defense of insanity was raised would seem to be of greater importance because there is less reason to suspect malingering. In *Gambrell v. State*[80] various reports written by the defendant to his employer were introduced, as were his letters and memoranda. Most were unintelligible and were usually signed "13" or "O-O" instead of having his signature.

F. *Predisposition toward insanity.* There are two ways of showing a predisposition toward insanity. The first is to show prior insanity on the part of the defendant. This may be done either by introducing evidence that the defendant was insane at an earlier time, which would

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[77]Tyler v. State, 199 Miss. 285, 24 So. 2d 740 (1946).

[78]Temple v. State, 165 Miss. 808, 145 So. 749 (1933) in which the defendant was able to deny rationally the accusations heaped upon him by the deceased immediately before the homicide.

[79]Kearney v. State, 68 Miss. 233, 8 So. 292 (1890) in which the court said by way of dicta:

> If at the instant of committing one homicide he [the defendant] declares that he has previously committed other [other homicides], and it be true that such others had been committeed by him as he states, this statement indicates that he was then sane to the extent at least of remembering correctly what had before occurred, and thus furnishes some light for the solution of the question of his sanity or insanity.

Note also that to prove the statement true the state would have to introduce evidence of prior homicides by the defendant. This is not usually admissible, but it would be admissible here because of the relaxed rules of evidence when insanity is pleaded.

[80]120 So. 2d 758 (Miss. 1960).

be useful if the evidence applied only to an earlier time and had no relevance whatsoever to the time the alleged act was committed, or by showing that the defendant had been adjudged insane in an earlier proceeding. This will be dealt with more fully in the next paragraph. The second way to show a predisposition toward insanity on the part of the defendant is to offer evidence of the insanity of the defendant's ancestors. The court will take judicial notice of the fact that insanity is hereditary.[81]

G. *Judgment of prior lunacy.* It has been noted that a presumption of continuing insanity is created if a defendant is shown to have had a continuing insanity is created if a defendant is shown to have had a continuing type of insanity. Certainly proof of such an adjudication would be important in proving insanity at a later time. One must assume from the language of *Ford v. State*[82] that if the defendant can show a prior adjudication of permanent insanity, the defendant will have successfully proven his insanity unless the state can prove a lucid interval. This might be said to conflict with the court's opinion in *Hoye v. State*[83] in which the court said that "adjudication as to insanity at one time is not conclusive of insanity at another time . . . ." The two cases can be reconciled, however, by observing that the *Ford* case merely creates a rebuttable presumption. Thus, the *Hoye* case must be said to state the law in Mississippi with regard to this subject. If the defendant has been adjudged insane at an earlier time, proof of the fact will be admissible to indicate, but not prove conclusively, that he is presently insane.

In addition to the various means of proof that have been discussed above, opinion evidence, a very important method of proof, deserves examination in more detail. As a general rule, a witness is allowed to state only the facts that are known to him. He is not permitted to give his opinion based on the facts because that would be invading the jury's province. However, when the plea is insanity, opinion evidence is admitted. One must always keep in mind that insanity is a status, rather than a physical fact, and the impression that the defendant made upon the witness is of the utmost importance in conveying to the jury the actual status of the defendant. The mind of the witness might be affected by many subtle symptoms of insanity which he might fail to relate when stating all the facts, yet these omitted facts can be brought home to the jury when the witness gives his opinion as to the sanity of the defendant. This mental conclusion called an opinion will encompass the conscious as well as the subconscious impression that the defendant made upon the witness. The value of this evidence lies as much

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[82] 73 Miss. 734, 19 So. 665 (1896).

[82] 73 Miss. 734, 19 So. 665 (1896).

[83] 169 Miss. 111, 152 So. 644 (1934).

in the witness's conclusion as in the facts upon which the conclusion was based. It has been held erroneous for the court to instruct the jury to consider only the facts and ignore the conclusions.[84] These conclusions are of two types: those given by expert witnesses and those given by non-expert or lay witnesses.

Expert witnesses are used at least as much and probably more in criminal cases dealing with the defense of insanity than in any other type of case; however, their testimony is not absolutely necessary.[85] The qualifications necessary for establishing a person as an expert are about the same in cases involving insanity as in other types of litigation. However, it is interesting to note some of the early qualifications that were imposed by our court and that are still present today. In *Russell v. State*[86] the court said that a person should "have long been conversant with insanity in its various forms." The court refused to permit a general practitioner to qualify as an expert. The opinion that the expert gives should be accompanied by some statement of the facts upon which he relied in formulating his opinion,[87] so that the jury will have some basis on which to evaluate the testimony. It is up to the jury to determine the weight of the expert testimony.[88] The case of *Reed v. State*[89] states that if the facts are admitted or not disputed and the issue becomes a question of science only, then and only then can the expert answer a general question, based on these facts, as to the defendant's sanity at the time of the alleged act.

Since that is not often the case, the usual method of obtaining an expert's opinion is to ask him a hypothetical question. In posing such a question the facts that tend to support the theory advanced by the party producing the expert are stated, the expert is asked to assume their validity and then to state his opinion based thereon. The hypothetical question must be very carefully phrased, because the expert must not be permitted or required to draw any conclusions of fact.[90] In the phrasing of the hypothetical the stating party is permitted to assume the validity of only the evidence favorable to him when there is conflicting evidence. When the opposite party has offered material evidence that is not disputed, this evidence must also be included in the hypothetical.[91] This type of questioning often tends to be long and involved, and the parties often seem to lose sight of the purpose of the hypothetical—to give the jury the benefit of an expert opinion. If the questions are too long and

84Bacot v. State, 96 Miss. 125, 50 So. 500 (1909).
85Keeler v. State, 226 Miss. 203, 84 So. 2d 153 (1955).
8653 Miss. 367 (1876).
87Reed v. State, 62 Miss. 405 (1884).
88Wood v. State, 58 Miss. 741 (1881).
8962 Miss. 405 (1884).
90Prewitt v. State, 106 Miss. 82, 63 So. 330 (1913).
91Cates v. State, 171 Miss. 169, 157 So. 95 (1934).

involved, they tend to lose their effectiveness because the jury cannot be certain of the exact facts on which the expert is basing his opinion. When the evidence is lengthy and the facts cumbersome, it would seem a better practice to use several shorter questions. The opposite party may cross-examine an expert witness, but he may not require the expert to answer a hypothetical question that is unsupported by any of the evidence.[92]

Non-expert witnesses have been permitted to testify to the sanity or insanity of a defendant since the early days of our legal system in Mississippi.[93] The case of *Wood v. State*[94] states an interesting rationale that seems to have been behind the adoption of this rule. It was said that "craft and deceit might mislead the one [the expert] into an error which the lifetime acquaintance and observation of the other [the non-expert] would readily detect." The rule has been followed by a long line of cases down to the present.[95] All these cases require that the non-expert witness accompany his opinion with a statement of the specific facts on which it is based. If the non-expert is of the opinion that the defendant was sane, he does not have to state any facts on which his opinion is based because he would have to indicate the absence of manifestations of eccentricities.[96] The opinion of non-expert witnesses has become so much a part of our handling of insanity defenses that it has been held that the state, which has the burden of proof, could succeed in meeting that burden while basing its entire case upon the testimony of non-expert witnesses.[97]

III. The Legal Test of Responsibility

Mississippi seems to have adopted the "right and wrong" test as the exclusive test for criminal responsibilty as stated in *Cunningham v. State*.[98] This test requires that a defendant must know the difference between right and wrong before he can be held criminally responsible for his acts. The fact that a defendant had been adjudged insane in a civil action prior to the alleged crime is not conclusive of the defendant's irresponsibility, because the defendant must be unable to tell the difference between right and wrong at the time of the alleged crime.[99]

92Kearney v. State, 68 Miss. 233, 8 So. 292 (1890).

93See Wood v. State, 58 Miss. 741 (1881).

94*Id.*

95Keeler v. State, 226 Miss. 203, 84 So. 2d 153 (1955); McGinnis v. State, 201 Miss. 239, 29 So. 2d 109 (1947); Baird v. State, 146 Miss. 547, 112 So. 705 (1927); Bailey v. State, 147 Miss. 428, 112 So. 594 (1927); Bishop v. State, 96 Miss. 846, 49 So. 945 (1909); Reed v. State, 62 Miss. 405 (1884).

96Baird v. State, 146 Miss. 547 122 So. 705 (1927).

97Keeler v. State, 226 Miss. 203, 84 So. 2d 153 (1955).

9856 Miss. 269 (1879). The *Cunningham* case has probably been cited more than any other Mississippi case in this area of insanity, but the first time the right and wrong test was adopted was in 1856 in Bovard v. State, 30 Miss. 600 (1856).

99Hoye v. State, 169 Miss. 111, 152 So. 644 (1934); Nelson v. State, 129 Miss. 288, 92 So. 66 (1922).

The definition that the court has used has been modified only slightly since its adoption. As stated in the *Cunningham* case, "When we speak of insanity as an excuse for crime, we refer, of course, to such degree of insanity as disqualifies from a proper perception of the difference between right and wrong . . . ." This definition was followed until 1909[100] when the case of *Smith v . State*[101] was decided. That case imposed the additional requirement that the defendant must not be able "to realize and appreciate the nature and quality" of his act. Since the *Smith* case, the supreme court has used the two definitions interchangeably.[102] Evidently the court did not mean for this to be an additional requirement, but merely treated the phrase that was added as being synonymous with the original test – an ability to distinguish between right and wrong.[103] This situation is easily explained since the right and wrong test that Mississippi applies is based upon the rule announced in the famous *M'Naghten's Case*[104] which included both elements as stated in the *Smith* case but which is often cited as requiring only the right and wrong distinction.

The next question that arises in the use of this test is the exact meaning of the word "wrong". Almost all of the decisions in Mississippi use the word "wrong" in stating the legal test without defining it in any way. It is conceivable that its meaning could be restricted to either legal or moral wrong. Two cases[105] seem to indicate that the court means that the defendant must not be able to distinguish between moral right and

[100]Ford v. State, 73 Miss. 734, 19 So. 665 (1896); Kearney v. State, 68 Miss. 233, 8 So. 292 (1890); Grissom v. State, 62 Miss. 167 (1884)

[101]95 Miss. 786, 49 So. 945 (1909).

[102]See for an example of the use of the *Smith definition*: Brummett v. State, 181 So. 323 (Miss. 1938). For an example of the definition requiring merely the ability to distinguish between right and wrong see: Stewart v. State, 203 Miss. 295, 33 So. 2d 787 (1948).

[103]The meaning of the two phrases has never been directly considered in Mississippi; but in jurisdictions where there has been a ruling on this particular point, it has been held that "knowledge of the wrongfulness of an act also embraces capacity to understand the nature and consequences of the same." Maas v. Territory, 10 Okla. 714, 63 Pac. 960 (1901). See also Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930).

[104]10 Clark & Fin. 200 (1843).

[105]In Kearney v. State, 68 Miss. 233, 8 So. 292 (1890) an instruction was given the jury to hold the defendant responsible if the jury felt that the defendant was capable of knowing that his actions were contrary to the law of the land regardless of "what the jury believe was the moral conception of the defendant . . . ." This instruction was held to be error. The court said that this instruction held the defendant to criminal responsibility although he did not know the difference between right and wrong. One can only conclude that "wrong" as used by the court in that case applied exclusively to moral wrong. In Smith v. State, 95 Miss. 786, 49 So. 945 (1909) the words "that he was unable to distinguish *moral* right from wrong" (Emphasis added.) were added to an instruction and were held to be necessary for the correctness of the instruction

wrong; but this writer feels, upon an examination of most of the Mississippi cases in this field, that the court, if required to specifically define the word "wrong," would define it so as to include both legal and moral wrong.

It is interesting to note that this test of responsibility, this requirement of knowing right from wrong, need be applicable only to the act in question. The defendant, according to the court, may be sane as to every other act he does; and yet if he is insane as to the act for which he is indicted, he is not to be held criminally responsible. The rule in Mississippi has been stated thus:

> The test with us in this class of cases is the capacity to distinguish between right and wrong, and we know no difference in this regard between total and partial insanity. If the disease goes to the extent of breaking down the distinction between a knowledge of right and wrong, it is immaterial whether the sufferer be totally or only partially insane on other subjects.[106]

The *Cunningham* case also recognized as a defense what is known as delusional insanity. Like the right and wrong test, delusional insanity originated in *M'Naghten's Case*. The gist of this test is that where the defendant has a delusion that makes him feel that certain imaginary facts are present, and he acts under the insane delusion in a manner that would be justifiable if the facts were true, then the defendant is not responsible for his acts. This test was overruled in the case of *Kearny v. State*.[107] An instruction was given to the jury that assumed the validity of the delusion of the defendant and then told the jury to find the defendant guilty if his acts were not justifiable under the law of the land. The court rejected this instruction by saying that although it gave full effect to *M'Naghten's Case* it could not be allowed since it ignored the right and wrong test and "imposes upon the insane the exact responsibility that rests upon the sane, with the single exception that the facts imagined by the insane to exist are for the purpose of the trial to be treated as real." Thus Mississippi's strict adherence to the right and wrong test has led to the disregard of the insane delusion theory unless the insane delusion was such that it rendered the defendant incapable of determining right from wrong or of knowing the nature and quality of his act.

This strict adherence to the right and wrong test has also caused Mississippi to reject unequivocally the irresistible impulse theory of legal insanity. To find the first rejection of this theory resort must be had again to the *Cunningham case*. This rejection has been followed ever

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[106]Grissom v. State, 62 Miss. 167 (1884). See also Hamburg v. State, 203 Miss. 565, 35 So. 2d 324 (1948).

[107]68 Miss. 233, 8 So. 292 (1890).

since,[108] the most recent case being that of *Burr v. State*.[109] The rejection is qualified to the extent that if the irresistible or uncontrollable impulse to commit an offense "springs from mental illness to such a degree as to overwhelm reason, judgment and conscience, in which case . . . . the accused would be unable to distinguish the right and wrong of a matter"[110] then the defendant must be held unaccountable for his actions. Of course this really is no exception to the rejection of the irresistible impulse theory at all, because a person whose "reason, judgement and conscience" are overwhelmed does not know the difference between right and wrong. This "exception" then, is merely a restatement of the right and wrong test. Although the court has gone to the trouble to create this so-called exception, it does not even appear to accept it when it is applicable. In fact, in a recent case[111] in which all the requisites for the "exception's" application were present by the testimony of expert witnesses, the court still refused to apply it. In that case a clinical psychologist testified expressly that the defendant "had failed to develop a sense of right and wrong or healthy conscience" and that the "strong uncontrollable compulsion" prevented defendant's knowing right from wrong. In spite of this evidence the court held that the defendant was merely relying on the irresistible impulse theory which had been rejected. The court never mentioned the "exception" that it had created and the requirements of it which were met.

VI. A Summary of the Criticisms of Each of the Existing Tests of Criminal Responsibility

One of the first criticisms of the right and wrong test was voiced some five years before the test was immortalized in *M'Naghten's Case*. It came from Dr. Isaac Ray, one of the founders of the American Psychiatric Association, in his *Medical Jurisprudence of Insanity*, where he referred to the right and wrong test as being "fallacious"[112] and said: "That the insane mind is not entirely deprived of this power of moral discernment, but in many subjects is perfectly rational, and displays the exercise of a sound and well balanced mind is one of those facts now so well established, that to question it would only betray the height of ignorance and presumption."[113] This view is still prevalent today and is accepted almost universally by medico-legal writers as being true. In 1928 Mr. Justice Cardozo said to the New York Academy of Medicine

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[108]Johnson v. State, 223 Miss. 56, 76 So. 2d 841 (1955); Eatman v. State, 169 Miss. 295, 153 So. 381 (1934); Smith v. State, 95 Miss. 786, 49 So. 945 (1909); Thomas v. State, 71 Miss. 345, 15 So. 237 (1893).

[109]114 So. 2d 764 (Miss. 1959).

[110]Burr v. State, 114 So. 2d 764 (Miss. 1959).

[111]Johnson v. State, 223 Miss. 56, 76 So. 2d 841 (1955).

[112]Ray, Medical Jurisprudence of Insanity 34 and 47 (1838)

[113]Ray, Medical Jurisprudence of Insanity 32 (1838).

that "everybody concedes that the present definition of insanity [the right and wrong test] has little relation to the truths of mental life."[114] Dr. Ben Karpman, a member of the staff of St. Elizabeth's Hospital in Washington, D. C., recently summed up this line of criticism when he said: "Another ancient and obsolete legal concept is that of knowing right from wrong as a test of insanity. Many insane people, and sane individuals as well, know perfectly well intellectually the difference between right and wrong, yet persist in committing the wrong because they do not appreciate the difference emotionally."[115]

The same type of criticism is expressed in another way by those who insist that the right and wrong test is predicated upon a false premise and that, if perhaps the premise did not seem false at the time of its inception, it is now obsolete and false in the light of modern psychological discoveries. One of the outstanding critics of this school is Professor Henry Weihofen. He has pointed out[116] that even today American courts still rely upon Blackstone who, in turn, relied upon Lord Hale, a product of the 1600's who believed that lunatics were affected by changes of the moon.[117] To support this contention that the *M'Naghten* test is predicated upon a false premise it is often pointed out that the test was stated at a time when Francis Gall's theory of phrenology was popular. Of course, modern psychology has exploded this theory.

> Yet it is this discarded fanciful brain-child of an eccentric Viennese physician of a hundred and thirty years ago that underlies the cornerstone of our law governing the criminal responsibility of the mentally unsound . . . .[118] Today phrenology has been relegated to the gypsy fortune-tellers of the ghettos, but the rule of law which it engendered still holds the respect of jurists.[119]

These are but two of the many different ways of expressing the same criticism: the right and wrong test is antiquated because it was formulated long before the birth of the science of psychology, and thus it does not provide for the proper utilization of the discoveries that have recently been made. This conclusion was reached[120] in *The Report of the Royal Commission on Capital Punishment* after one of the most exhaustive studies that the problem has ever received. The Commission stated that the right and wrong test is "based on an entirely obsolete and misleading conception of the nature of insanity."[121]

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[114]Cardozo, What Medicine Can Do For the Law 32 (1930).

[115]Karpman, *On Reducing Tensions and Bridging Gaps Between Psychiatry and the Law*, 48 J. Crim. L., C. & P.S. 164 (1957).

[116]Weihofen, Insanity as a Defense in Criminal Law 3 (1933).

[117]Pleas of the Crown 31.

[118]Weihofen, Insanity as a Defense in Criminal Law 4 (1933).

[119]*Id.* at 78.

[120]Royal Commission Report 73-129 (1954).

[121]*Id.* at 80

Another objection is that the right and wrong test imposes too many restrictions and limitations upon the psychiatrist in his effort to aid the court. Because of the hypothetical question, the psychologist is required to pass moral judgment, a thing that he is not trained to do and that is the peculiar province of the jury.[122] This is an important objection, but it is definitely of less importance than the one stated earlier.

Because of the criticism of the right and wrong test, that it deals only with the cognitive or intellectual aspect of man's mind, attempts were made to extend the test to cover situations in which the mental disease or defect affected man's volition. This resulted in the creation of the irresistible impulse test.[123] It applies to one whose mind was in such a diseased condition that his will power was destroyed and who thus could not resist an impulse to commit an act even though he knew it was wrong.[124] It is important to note that irresistible impulse is not a substitute for *M'Naghten's* rule. The fourteen states and the federal jurisdictions[125] that follow the irresistible impulse test use it to supplement the right and wrong test.

It is interesting to note that the irresistible impulse test was adopted in the United States some nine years before *M'Naghten's* test was stated[126] and was later recognized as:

> A moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance.[127]

This combination of the two tests seems to answer the principal objection that is so often voiced against the right and wrong test alone, since it provides for mental disorders affecting the volitional faculty.

122See: Roche, *Criminal Responsibility and Mental Disease: Medical Aspects*, 26 TENN. L. REV. 222, 229 (1959); *Criminal Responsibility and Proposed Revisions of the M'naghten Rule*, 32 ST. JOHN'S L. REV. 247, 251 (1958); Karpman, *On Reducing Tensions and Bridging Gaps Between Psychiatry and the Law*, 48 J. CRIM. L., C. & P.S. 164 (1957); *Sobeloff, Insanity and the Criminal Law: From M'Naghten to Durham and Beyond*, 41 A.B.A.J. 793, 877 (1955).

123See generally, Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956 (1952).

124For representative cases, see: Barbour v. State, 262 Ala. 197, 78 So. 2d 328 (1954); Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914 (1958); United States v. Smith, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954); Thompson v. Commonwealth, 193 Va. 704, 70 S.E.2d 284 (1952).

125See: Annot., 45 A.L.R.2d 1453 (1956) and the Digest of Supplemental Decisions.

126State v. Thompson, Wright's Ohio Rep. 617 (1834).

127Commonwealth v. Mosler, 4 Pa. 264 (1846). See also the two famous cases of Parsons v. State, 81 Ala. 577, 2 So. 854 (1887) and Commonwealth v. Rogers, 7 Metc. 500 (Mass. 1844).

Nevertheless, the irresistible impulse test has also met with criticism, usually for one of two reasons. The first is really a combination of several ideas advanced while the test was in its infancy. It can be stated in the alternative: Such an impulse really does not exist; and if it does exist medically it is not susceptible of legal proof, so it should not be recognized at law.[128] The other reason is that there is a requirement of spontaneity, which is implied from the word "impulse." This would exclude mental disorders which cause long periods of brooding and meloncholia, which, in turn, result in the commission of a crime by a person who knew that it was wrong but who had no volitional control.[129]

By 1871 the state of New Hampshire had formulated its own special doctrine of criminal responsibility.[130] Since that time it has gone unnoticed and unused by any other jurisdiction. Truly, it has been New Hampshire's octogenarian wallflower. Interest in this doctrine was restored in 1954 when the case of *Durham v. United States*[131] made reference to it. This slight reference has led many legal and medical writers to equate the New Hampshire doctrine with the *Durham* rule.[132] Such is not the case, however;[133] but because of the confusion that exists, many references must be made in this discussion of New Hampshire's doctrine to the *Durham* case.

The first observation to be made in this discussion is that New Hampshire has developed a *doctrine* of criminal responsibility, not a test. This is easily seen when one realizes that the doctrine got its beginning in a

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[128]The skepticism is manifested in the following quotations: "The possibility of the existence of such a mental condition is too doubtful, the theory is too problematical, and too incapable of a practical solution, to afford a safe basis of legal adjudication." Smith v. State, 95 Miss. 786, 49 So. 945 (1909). "If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help." The King v. Creighton, 14 Can. Cr. Cas. 349 (1908). In reply to the first quotation it can be pointed out that: "Time was when the chief objection to this defense was that it was hard to prove and easy to malinger. However any phychiatrist, given sufficient time with the patient and an adequate history, can recognize a psychosis, and if the doctrine be limited to psychotic impulses, there is no serious probative difficulty. If the defense is expanded to include neurotic impulses, modern psychiatric science can still meet the challenge." Davidson, *The Psychiatrist's Role in the Administration of Criminal Justice*, 4 RUTGERS L. REV. 578 (1950). There appears to be no reply to the cynical approach of the second quotation!

[129]ROYAL COMMISSION REPORT 110 (1954); GLUECK, CRIME AND JUSTICE 101-03 (1936); GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 410-12 (952).

[130]State v. Jones, 50 N.H. 369 (1871).

[131]214 F.2d 862 (D.C. Cir. 1954)

[132]See *e. g.*, 31 MISS. L.J. 180 (1960); 5 VILL. *L.* REV. 139 (1959); 32 ST. JOHN L. REV. 247 (1958); 22 U. CHI. L. REV. 318, 320, 356 (1955).

[133]REID, UNDERSTANDING THE NEW HAMPSHIRE DOCTRINE OF CRIMINAL INSANITY, 69 YALE L.J. 367 (1960).

probate appeal,[134] not in a criminal action. Judge Doe felt that the problem was evidentiary and a question of fact. The rest of the court finally agreed with him in the case of *State v. Jones*[135] stating that there should be no test to determine sanity since any time a court tried to formulate a test " it must always be attended with failure, because it is an attempt to find what does not exist, namely, a rule of law wherewith to solve a question of fact." Thus, the court carefully worded the doctrine so that it would guide but not limit the jury[136] in its fact-finding capacity: "At the trial where insanity is set up as a defense, two questions are presented: First: Had the prisoner a mental disease? Second: If he had, was the disease of such a character, or was it so far developed, or had it so subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent?"[137]

A reading of the cases of *Boardman v. Woodman*,[138] *State v. Pike*,[139] and *State v. Jones*[140] will show that the court did not mean to distinguish between disease and defect but intended for all phases, conditions and descriptions to be grouped together in the one word, "disease". This is consistent with the approach of having no test or definition but of permitting the jury to resolve all questions of fact.

The discussion and criticism that had been going on concerning an adequate legal approach to the problem of criminal responsibility received recognition by a federal court in 1954. That, of course, was in the now-famous *Durham* case. Judge Bazelon wrote the opinion that discarded the *M'Naghten* test as well as the irresistible impulse test in one fell swoop. The basis for the change was that modern science had shown the other two tests to be inadequate. A substitute test was created and worded in a way which the court thought would avoid the pit-falls of prior tests. The test is "simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." In a hypothetical instruction to a jury, the court stated that the act must be the "product" of the mental abnormality. This result met with wide acclaim from most psychologists[141] and with skepticism from

134Boardman v. Woodman, 47 N.H. 120, 140 (1865) (dissenting opinion).

13550 N.H. 369 (1871).

136This is not to say that the New Hampshire doctrine imposes no restrictions on the extent of criminal responsibility, because it does. However, the doctrine does not try to limit the jury in the process of deciding whether or not a particular factual situation is within the boundary that is set by the doctrine and by society.

137State v. Jones, 50 N.H. 369 (1871).

13847 N.H. 120 (1865).

13949 N.H. 399 (1869).

14050 N.H. 369 (1871).

141"Psychiatrists will welcome the *Durham opinion* . . . ." Roche, *Criminally and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320 (1955). "The voice of American psychiatry is certain to be raised in praise of the decision in Durham v. United States. . . ." Guttmacher, *The Psychiatrist as an Expert Witness*, U. CHI. L. REV. 325 (1955). *But see*: Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 183 (1958) who referred to it as "unadulterated nonsense."

the legal profession.[142]

The *Durham* test raises at least two questions that are not applicable to the New Hampshire doctrine. The first is the definition of " mental disease" and of "mental defect." The opinion tried to define the two in general terms, and this definition has been supplemented in the case of *Carter v. United States*[143] in which mental diseases were equated with medically recognized illness of the mind. This has not solved the problem, and the very fact that the court has tried to legally define the terms indicates that the more logical approach of the New Hampshire doctrine could not be accepted in the federal jurisidiction or any other jurisdiction that would follow *Durham*. The second question is also one of definition. What is the degree of causation that is necessary to satisfy the requirement that the act be the "product" of the mental abnormality? The New Hampshire doctrine is not a "test"; so the word "product" when used there need not be defined legally, but not so with the *Durham* test. The *Carter* case implies that the "but for" test is to be applied: would the act not have been committed but for the abnormality? This complicates the problem of burden of proof for those jurisdictions which might follow the *Durham* test, because "the Government is given what in many instances may be an impossible burden."[144]

Of the criticisms leveled at both the *Durham* test and the New Hampshire doctrine, one of the most common is that the abolition of any legal test leaves the jury without any guide: "You give the jurors no rules and you ask them — on the basis of psychiatric talk — to state their conclusions. Now I would sooner inconvenience my psychiatrists and inconvenience them seriously, and force them to do something that is not within their training, than to leave lay jurors completely uninstructed."[145] Another basis for this criticism, and one that seems more valid, is that the jury would pass on the individual merits; and there

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[142]"A legal principle beclouded by a central ambiguity, both unexplained and unsupported by its basic rationale . . . ." Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955). "The abdication of responsibility for determining the standard of criminal responsibility. . . ." Sauer v. United States, 241 F.2d 640 (9th Cir. 1957).

[143]252 F.2d 608 (D.C. Cir. 1957).

[144]Gasch, *Prosecution Problems Under the Durham Rule*, 5 Catholic Law. 5 1959. See also 26 TENN. L. REV. 232 (1959).

[145]Kuh, *Criminal Aspects and Mental Disease: Legal Aspects*, 26 TENN. L. REV. 245 (1959) to which Mr. Marvin Comisky replied:

> We submit everything conceivable to a jury. If you have tried any income tax cases, particularly in the net worth field, you know how complicated the factual situation can be. Other instances are in the antitrust field and complicated questions of engineering. Even in the negligence field, many times a jury is called upon to determine very complicated medical questions, even though faced with a conflict of medical testimony . . . . This issue of

would be no standard to be applied in every case to insure equality.[146]

A popular idea is that the *Durham* test and the New Hampshire doctrine will cause insanity to be pleaded much more often and to be used at times when the defendant would normally have gone to jail.[147] Although statistics are not available from New Hampshire,[148] the statistics from the District of Columbia indicate that the defense of insanity has been used but slightly more than in pre-*Durham* years, and the number of acquittals has not gotten out of hand.[149] This criticism has also been met by the passing of statutes that require a person so acquitted to be committed to a hospital for the insane for observation and to be pronounced well by the hospital staff before release.[150]

Conclusion

The statues of the law with regard to pleading present insanity at the various stages of criminal proceedings needs no further comment. It, like the special rules of evidence, is reasonably up-to-date and progressive in many ways. The only changes that should be made are minor and are not of sufficient importance to receive attention here.

Such is not the case with the problem of the test of criminal responsibility that Mississippi has adopted. There is a very definite need for charge. The section dealing with the criticisms of not only Mississippi's test but also of all the other tests was intended to show that, while none of the existing tests are perfect and beyond criticism, the right and wrong test, Mississippi's test, is the one that is most inadequate and unjust.

Merely examining the various tests and some of the more succinct criticisms will not solve the problem that is facing the courts of Mississippi today, nor will it suffice to give the simple suggestion that some other test be adopted without concluding which test and why.[151] Indeed anyone who studied this area of the law probably will, and should, feel

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determining medical testimony can be resolved by the jury just as it resolves every other issue of fact. In my opinion, it furnishes no basis for the refusal to follow the *Durham* case.

146"'Equal protection of the laws' in turn includes the right to be tried and punished in the same manner as others accused of crimes are tried and punished." Lynch v. United States, 189 F.2d 476 (5th Cir. 1951).

147See *e.g.*, Testimony of Deputy Chief E. E. Scott before Subcommittee on Constitutional Rights of the Senate Judiciary Committee, March 11, 1958.

148To the Royal Commission's questionnaire, asking for statistics on the number of murders known to the police, number of convictions, etc., New Hampshire replied that "no information is available." Royal Commission on Capital Punishment Questionnaire, Question 30.

149See Clayton, *Six years After Durham,* 44 J. Am. Jud. Soc'y 18 (1960).

150See, *e.g.*, 24 District of Columbia Code 301 (1955). See Clayton, *supra note* 149 at 20.

151See, *e.g.*, 31 Miss. L.J. 181 (1960).

compelled to advance his own ideas for a test in hope that the solution might be reached at last. As Judge Doe said:

> A mere negation of the obsolete medical theory is not enough. An affirmation of some definite proposition which you contend for as true, is indispensable. You must have an affirmative proposition, simple, plain and easily understood, which the court can give the jury as positive law, and which the jury can apply to the evidence in every case. It must be safe, practical and workable, and broad enough to cover the whole ground.[152]

The conflict of perspectives between law and psychology is the crux of the problem for which a solution is being sought. While the psychogist strives to utilize a scientific approach to the study of men's minds based upon postulates that require objectivity and a suppression of the psychologist's moral evaluations of his patient,[153] the attorney, the judge, and the jury must make much the same type of examination of human conduct and then pass moral judgment on it. This difference in approaches to an evaluation of human conduct is the source of the confusion. It requires everyone to consider at length the reason for the existence of the criminal law and the methods of preserving its integrity and respect.

The problem may be reduced to simpler terms: the result of criminal law is the punishment of those found guilty of its violation and the exoneration of those found innocent. The choice of perspectives will determine the attitude toward punishment, and it is this attitude toward punishment that affects one's concepts of responsibility. Thus it is that one greatly influenced by the empirical sciences sees punishment as an emotional response to the need for vengeance that he feels is inherent in humanity.[154] Persons so influenced tend to advocate a more lenient test of responsibility and are usually the ones leading the fight against the sterner rules that society is wont to follow.[155] In the eyes of the law, punishment is inflicted upon those who are responsible so that: First,

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152Letter from Judge Doe to Clark Bell, Jan. 10, 1889, in: Bell, *Editorial: The Right and Wrong Test in Cases of Homicide by the Insane,* 16 MEDICO-LEGAL J. 260, 264 (1889) as quoted in 69 YALE L.J. 373 (1960).

153It has been suggested, however, that the psychologist should examine the moral orientation of society and how the patient fits in because, as Dr. Wertham said, "An asocial psychiatry becomes inevitably an anti-social psychiatry." See Dr. Wertham's book review in 22 U. CHI. L. REV. 569 (1955). See also Hall, *Psychiatry and Criminally Responsibility,* 65 YALE L.J. 761 at 782-83 (1956).

154See Judge Bazelon, *The Imperative to Punish,* The Atlantic Monthly, July, 1960, Vol. 206, No. 1.

155A good example of this is the tremendous number of psychologists that have fought the *M'Naghten* test for so long. But perhaps a better example can be found in our own legal profession in the person of Judge Bazelon and his brothers who concurred with him in the *Durham* case. Even a cursory reading of the opinion will reveal the great extent to which the court was influenced by the empirical

society may be protected from future misconduct by the wrong-doer; second, others may be dissuaded from committing the same wrong; and third, in meritorious cases, the offender may be rehabilitated. No matter which viewpoint is adopted, it will be agreed that those who are helpless victims of disease of the mind should not be punished. However, the amount and degree of disease necessary to render one irresponsible will be determined by the choice of perspectives.

Since this is a legal problem, the amount of mental disease or at least the nature of the disease must be of greater extent to find a person irresponsible than if the courts were permitted to approach the problem with the attitude of a psychologist. It is quite consistent with the approach that society requires of the law for a person to be held responsible for his acts even though he may be suffering from a mental disease. Even the psychologists admit that there are times when a person suffering from a mental disease must be held responsible for his actions.[156] Thus it is that society, realizing this, demands that the law erect a standard that can be applied equally so that the mere presence of a psychoneurotic disorder or a personality disorder will not, per se, render a person irresponsible. Since society holds some afflicted persons responsible for their acts, the criminal law must do the same if it is to retain the respect that it has now.

This may be attained by the creation of a standard or test for determining legal responsibility that a jury may apply in all cases. It would seem that the necessity for having a constant standard negatives the New Hampshire idea that responsiblity is *entirely* a question of fact. The standard must be legally defined, but its application is purely a question of fact to be decided by the jury. The psychologist should enter the courtroom only to inform the jury as fully as possible as to the mental condition of the defendant, and not to make the ultimate decision of guilt or innocence.[157] Since the measure of responsibilty is set by society, the test should be lenient enough to permit the jury to include in the ver-

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science of psychology, and the courts attitude toward criminal responsibility was made more than evident there. When one reads Judge Bazelon's attitude toward punishment as expressed in *The Imperative to Punish, supra* note 154, the relationship between the two attitudes becomes evident.

156Davidson, *The Psychiatrist's Role in the Administration of Criminal Justice,* 4 RUTGERS L. REV. 578 at 587 (1950):

> Unless a man is held answerable for doing what he knows he should not do, there will be no enforceable sanction against criminal behavior. Even very phychotic patients can be influenced by fears, hopes and promises. A mental hospital today is not a Bedlam, precisely because so many of their insane patients try hard to conform to hospital rules in the hope of early release or transfer to a better ward. Not all patients are responsive to external social pressures; but many are: *And it is not unreasonable to hold even a lunatic accountable for doing something that he really knows is wrong. They do it every day in mental hospital.* (Emphasis added.)

157Holloway v. United States, 148 F.2d 665 (D.C. Cir. 1945).

dict a reflection of the prevailing ethical beliefs of the community. For, after all, this is one of the primary reasons for having a jury.[158]

It would seem that the following test fulfills the requirements stated above while answering most of the criticisms that have been advanced against the existing tests: *A person will be held criminally responsible unless a mental disease prevents him from controlling his conduct or from understanding that he was committing a legal wrong. In deciding whether a defendant fits within the degree of responsibility circumscribed by this rule, the jury should realize that:* (*a*) *the idea of excitement or impulsive or spontaneous action has no relevance at all in determining the presence or absence of control, and* (*b*) *the defendant must have a disease of the mind, normally extending over a long period of time, as distinguished from a sort of momentary lack of control arising from the pressure of circumstances.*

It is submitted that this test answers the many criticisms that have been voiced against the existing tests. The test permits the jury to express themselves in language that is meaningful to all, instead of to a specially trained group, while recognizing the fact that mental disease can affect one's volitional as well as one's cognitive faculties. By failing to define "disease" the test follows the New Hampshire doctrine in permitting the word to encompass every technical term that the psychologists have thought of or will think of. This utilizes the requirement of the common law that the jury will be the triers of fact, for the jury may hear the psychological testimony and then decide whether there is a "disease" within the accepted meaning that the community applies when thinking of criminal responsibility. In this way the jury can reflect the ethical standards of the community while having a test that can be applied in all cases to help insure equality for all. The criticism of the irresistible impulse test has been met because the implication of spontaneity has been expressly negatived. Probably the greatest strength of this test is that while it is not based upon the psychological knowledge of the day but on sound principles of the common law, it permits an adequate consideration of not only the present psychological knowledge but also of advances that will be made in the future.

Lee Davis Thames

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[158]The role of the jury has always been to apply "our inherited ideas of moral responsibility to individuals prosecuted for crime." Durham v. United States, 214 F.2d 862 at 876 (D.C. Cir. 1954).

USE OF THE SURFACE FEE BY THE MINERAL OPERATOR

I. Introduction

This comment attempts to gather cases selectively and to analyze the growing body of law arising out of the conflicts between the holder of the surface fee, the surface owner or lessee, and the mineral operator. "Mineral operator" is used in this comment to include that person or company which is entitled to develop the minerals under the land. This may be the mineral owner, a lessee or an assignee. The relations created by underground torts and those peculiar to geophysical exploration are omitted from this writing since they involve material worthy of independent consideration.

II. The Nature of the Relationship

Professor Summers has observed that regardless of the theory of ownership of minerals followed in each jurisdiction, the rights and liabilities of the operator in regard to the surface estate are governed by the ordinary rules of property and tort law.[1] While this is true, it may prove misleading unless understood in the light of the facts which give rise to the application of these rules. Although the "ordinary law" generally prevails, it is the ordinary law colored by these highly individualized factual situations existing by virtue of the industry's uniqueness and the unique concept of separate surface and sub-surface interests.

When a thing is granted or an obligation is assumed, it is implied in the transaction that the grantee or obligee takes the right to use all methods necessary and proper in the subjugation of that granted or the performance of the obligation.[2] Thus, when the lessee takes an oil and gas lease, an easement or right of user, even if not granted by the terms of

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[1] Summers, Oil and Gas § 651 (perm. ed. 1938).

[2] *E.g.*, Wohlford v. American Gas Prod. Co., 218 F.2d 213, 4 O. & G.R. 448 (5th Cir. 1955); Vodopija v. Gulf Refining Co., 198 F.2d 344, 1 O. & G.R. 1210 (5th Cir. 1952); Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S.W. 286 (1921); Callahan v. Martin, 3 Cal. App. 2d 110, 43 P.2d 788 (1935); Rohner v. Astral Oil Exploration Co., 104 So. 2d 253, 9 O. & G.R. 1116 (La. 1958); Gulf Refining Co. v. Davis, 224 Miss. 464, 80 So. 2d 467, 4 O. & G.R. 983 (1955) McNeese v. Renner 197 Miss. 203 21 So. 2d 7 (1945); Wilcox Oil Co. v. Lawson, 341 P.2d 591, 10 O. & G.R. 991 (Okla. 1959); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362 (1957). See generally Brown, Oil and Gas Leases § 3.06 (1st ed. 1958); 4 Summers, Oil and Gas § 652 (perm. ed. 1938).

A graphic example of the operator's right to use the surface is found in *Vodopija v. Gulf Refining Co., supra.* In that case the owner of the fee granted a mineral lease to defendant. Plaintiff was later granted an oyster lease. Plaintiff asked for damages suffered due to the drilling by the defendant which muddied the oyster beds and otherwise greatly damaged the oyster crop. Under these facts the court of appeals held that so long as the operation was not negligent and the damage not due to any unreasonable methods of operation no recovery would be granted.

the lease instrument, is granted by implication to the extent that it is necessary to the performance of the terms of the lease. The interest granted is dominant upon the servient surface estate retained.[3] But this dominancy is limited to the purposes of the grant and by *reasonableness*. Therefore, the holder of the servient estate may still use the surface in any manner not inconsistent with the interest of the mineral operator, even to the extent of leasing to a third party, and the operator may use only so much of the surface as is necessary to his operations.[4] Although the terms "reasonable" and "necessary" are meaningless when used without a factual reference, the case law has now developed to a state which gives a rather explicit guide of conduct.

Grimes v. Goodman Drilling Company[5] poses a good example of the dominancy which is given to the right of the operator by the courts. In that case the operator held a lease on a city lot which belonged to the plaintiff and commenced the drilling of a well thereon. This was in an era before adequate spacing regulations prevented drilling on such small tracts. It was proved that the slush pit was so close to the dwelling house of the surface owner that it was necessary to close up that side of the house to prevent mud from splattering into it. Further, derricks of the type used by the operator had recently been blown over by a wind storm in the area, and the operator's derrick was within a few feet of the plaintiff's house. The owner also complained of the intolerable noise and fumes from the rig; the boiler was so close to the house that it prevented the opening of a door. Even under these facts it was held that the right of the operator to use the surface was dominant to the interest of the surface owner. The court reasoned that since the owner purchased the land with knowledge of the lease and of the lessee's obligation to drill, the owner stood in the position of the original grantor. The only restriction upon the right of the lessee in the lease instrument was a provision that no dwelling house would be removed. This case is a graphic illustration that a use which is reasonable although inconvenient to the surface owner will be permitted.

The general rule that the right of surface user is implied is followed in Oklahoma where the instrument excepts or reserves the mineral

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[3]*E.g.*, Lynn v. Maag, 220 F.2d 703, 4 O. & G.R. 1037 (5th Cir. 1955); Alphonso E. Bell Corp v. Listle, 74 Cal. App. 2d 638, 169 P.2d 462 (1946); Gulf Refining Co. v. Davis, *supra* note 2; Indian Territory Illuminating Oil Co. v. Dunivant, 183 Okla. 233, 80 P.2d 225 (1938); Warren Petroleum Co. v. Martin, 153 Tex. 465, 271 S.W.2d 410, 3 O. & G.R. 1556 (1954). See generally McMahon, *Rights and Liabilities With Respect to Surface Usage by Mineral Lessees*, THE SIXTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 231 (Southwestern Legal Foundation).

[4]*E.g.*, Vodopija v. Gulf Refining Co., 198 F.2d 344, 1 O. & G.R. 1210 (5th Cir. 1952); Gulf Refining Co. v. Davis, 224 Miss. 464 80 So. 2d 467, 4 O. & G.R. 983 (1955); Sanders v. Davis, 79 Okla. 253, 192 Pac. 694 (1920); Grubstake Investment Ass'n v. Coyle, 269 S.W. 854 (Tex. Civ. App. 1925).

[5]216 S.W. 202 (Tex. Civ. App. 1919).

rights and where the right to produce is conveyed by a lease.[6] However, where the minerals are conveyed by grant, this was held not to be true in *Morgan v. McGee*.[7] In making the distinction between exceptions, reservations and leases on one hand and mineral conveyances on the other, the court reasoned that where the fee was conveyed subject to a reservation or exception of the minerals, the right of user was already in existence and owned by the grantor. Therefore, it was reasoned, nothing new was created, but rather the grantor simply conveyed less than he owned. But where the mineral interest was conveyed by grant, to find an implied right to use the surface would be to find an implied conveyance of more than the grantor declared an intention to convey. The court relied upon the axiom that the extent of the servitude is determined by the terms of the grant. Although assuming the efficacy of the axiom, the court's application of it and the distinction drawn is both logical and consistent with the traditional application. The difficulty is both a logical and a semantic one within the axiom itself. Before the axiom can be applied it must first be assumed that the terms of the grant have a particular meaning. Since words are symbols they have meaning only by implication, and further the same word will have various implications depending upon the context in which it is used. Thus, the axiom is of no value as a test to determine the extent of the grant, since before it can be applied, the implications inherent in the words themselves must be determined. In 1940 the distinction between grants and reservations was abandoned when the *Morgan* case was expressly overruled in *Melton v. Sweeds*.[8] Today Oklahoma holds that the user is implied regardless of the method of separation of the minerals from the surface.

Oklahoma has also taken a somewhat unusual position as to the nature of the user. As indicated above, a majority of oil and gas jurisdictions hold that although the right of the mineral operator is dominant, he may not exclude the surface holder from use of the land upon which he operates so long as the use by the surface holder is not inconsistent with the operator's rights. But in *Mid-Continent Petroleum Corp. v. Rhodes*,[9] Oklahoma announced a different rule. The suit was brought by a subsequent surface lessee against a prior mineral lessee for damages

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[6]See, *e.g.*, Burns v. Bastien, 174 Okla. 40, 50 P.2d 377 (1935), exception; Smith v. Kerr, 100 Okla. 162, 228 Pac. 951 (1924), reservation. *But see* Cities Service Oil Co. v. Ducas, 325 P.2d 1035, 9 O. & G.R. 206 (Okla. 1958).

[7]117 Okla. 1212, 245 Pac. 888 (1926).

[8]188 Okla. 388, 109 P.2d 509 (1940).

[9]205 Okla. 651, 240 P.2d 95, 1 O. & G.R. 119 (1951) In the *Mid-continent* case the court said: "Defendants, as holders of an oil mining lease from the Osages, owned an estate in the land for purposes of exploring for oil and possessed exclusive right to use much [sic] of the leased premises as was reasonably necessary in the operation of drilling for oil." The court further stated that, "the plaintiff's cattle entering upon the location site of the drilling well, and upon the premises

arising from injury to his livestock caused by their drinking salt water which had collected around the rig. The court denied recovery saying that the cows were trespassers and that the mineral lessee had a right to exclusive possession of the area necessary for drilling operations. In 1952 the court quoted the *Mid-Continent* case in *Wellsville Oil Co. v. Carver*[10] repeating this proposition. Since that time the court has not found it necessary to go this far, but it has not handed down any decision in any way inconsistent with the view adhered to in these cases. Thus, it seems that Oklahoma allows the mineral lessee exclusive possession of that part of the surface necessary to his operation during the term of his mineral interest.

Mississippi has taken a unique approach but along different lines. In 1922 the supreme court decided the perplexing case of *Moss v. Jourdan*.[11] There the mineral owner sued to enjoin acts of the surface owner who was preventing him from removing gravel. The court refused the injunction saying that the mineral owner must leave sufficient subjacent land to support the surface. The surface owner showed that the gravel was just beneath the surface stretching throughout the land and that to remove it would require destruction of the surface. Since the damage to the surface owner would be irreparable, and since he would be entitled to an injunction against the mineral owner, the court said that it would not enjoin the surface owner from preventing injury to the surface. The Mississippi court enunciated the following dictum which has caused confusion in the later oil and gas cases: "[T]he owner of the mineral in land will not be enjoined from removing it at the instance of the owner of the surface, but will be remitted to his action at law for damages, unless the injury that would result therefrom to the surface will be irreparable." It is important to note that the dictum does not announce any conditions of negligence or misuser as precedent to recovery of damages, nor does it purport to make the mineral owner absolutely liable for all injury to the surface; it merely sets forth the general rule that the court will deny injunction if damages are adequate compensation for a wrong. As authority this case seems to be limited to situations involving permanent or irreparable injury. Yet in *Pace v. State*,[12] decided almost twenty years later, the Mississippi court used this language as authority in deciding that the holder of a surface interest is entitled to compensation for "any damages that may be sustained to the

in use by the defendants as was reasonably necessary in their operation in drilling for oil, were in law trespassers." *Accord*, Pure Oil Co. v. Grear, 183 Okla. 484, 83 P.2d 389 (1938). *Contra*, McCarty v. White, 314 S.W.2d 155, 9 O. & G.R. 386 (Tex. Civ. App. 1958).

10206 Okla. 1181, 242 P.2d 151, 1 O. & G.R. 457 (1952).

11129 Miss. 598, 92 So. 689 (1922).

12191 Miss. 780, 4 So. 2d 270 (1941).

surface rights in the course of the exploration or development of the land for oil and gas." It is true that the *Pace* case is limited by its facts to state lands and the rights as between lessees of the surface and the mineral rights and the mineral owner. However, the court did not see fit to limit the words of the opinion to public lands, but on the contrary the court based its opinion upon the *Moss* case which did not involve public lands. It appears from these authorities that although the mineral operator is entitled to reasonable use of the surface and may not be excluded therefrom, in Mississippi he must pay for damages done to the surface, even if that damage is not excessive.

III. The Duty to Restore the Surface

The standard of "reasonable use" which governs the nature of the operator's use of the land does not imply that he is bound to restore the location when he leaves. On the contrary, the courts hold generally in the absence of contractual and statutory provisions that there is no such duty incumbent upon the operator. Therefore, he is not bound to fill pits and sump holes or to smooth out the surface when his occupancy is terminated.[13] Nor is he liable for crops destroyed by his occupation unless more than are reasonably necessary are destroyed.[14] It has also been said that "the right to remove structures includes the right to do such damage to the leased property as such removal will naturally or necessarily cause."[15] These words would seem to mean that there would be no liability for cutting up pasture land with trucks and tractors, for erosion caused by clearing the location or for any other damage naturally or necessarily growing out of moving operations. The position of Oklahoma on the duty to restore was stated clearly in a recent case, *Wilcox Oil Company v. Lawson*:[16]

> The holder of a valid oil and gas lease has the right and privilege to go on the land and do all those things necessary and incidental to the drilling of wells, including the right to the use of the surface, and in the absence of provision that the lessee would be liable for growing crops, the only basis for recovery of damages is proof of wanton or negligent destruction . . . .

13*E.g.*, McLeod v. Cities Service Gas Co., 131 F. Supp. 449, 4 O. & G.R. 1732 (D.C. Kan. 1955); Duvanel v. Sinclair Refining Co., 170 Kan. 483, 227 P.2d 88 (1951); Bell v. Cardinal Drilling Co., 85 N.W.2d 246, 8 O. & G.R. 747 (N.D. 1957); Fox v. Cities Service Oil Co., 201 Okla. 17, 200 P.2d 398 (1948); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362 (Tex. Civ. App. 1957).

14See, *e.g.*, Warren Petroleum Corp. v. Monzingo, *supra* note 13. See generally Kulp, Oil and Gas Rights, § 10.58 (1st ed. 1954).

15Fox v. Cities Service Oil Co., 201 Okla. 17, 200 P.2d 398 (1948); Arkansas Fuel Oil Co. v. Connellee, 39 S.W.2d 99 (Tex. Civ. App. 1931). See generally Kulp, Oil and Gas Rights, § 10.58 (1st ed. 1954).

16341 P.2d 591, 10 O. & G.R. 991 (Okla. 1959); *accord*, Cities Service Oil Co. v. Dacus, 325 P.2d 1035, 9 O. & G.R. 206 (Okla. 1958).

This language is representative of that used in other jurisdictions.

Although the Mississippi Supreme Court has not yet couched a decision in terms of "duty to restore," it appears from the *Moss* and *Pace* cases discussed earlier that such a duty does exist in this state. It seems that the only logical result of these cases and their dicta is that the mineral operator is liable for all damage done. If this is true, unless the operator restores the premises to their former condition, he is liable when he leaves the location for damages caused by his operations. The court may, of course, find the language of the *Pace* case limited to state property and that its application of the dictum of the *Moss* case is erroneous. Such a decision would seem to be the better of the alternatives and would certainly be in line with the general rule drawn from other oil and gas jurisdictions. It is difficult to resolve a right to surface user inherent in the mineral estate with a duty to pay damages in the absence of negligence or misuser. But this problem has become practically moot because of current lease forms which provide for this situation.

Louisiana uniquely provides by statute that there is a duty upon the operator to restore the drilling site. The court of that state in 1947, awarding damages for injury done to the surface where the defendant had no right to drill at all,[17] applied a general statute[18] imposing a duty to return premises leased in substantially the same condition in which received. Although the reference to the statute in that case was purely dictum, in 1953 the Louisiana court had before it a case in which a plaintiff did lease the premises from the owner for the purpose of drilling.[19] The court did not specifically cite the statute, but it said that the lessee "should maintain and restore the premises in the condition he found them subject to his rightful use, and where he had damaged the land it is his duty to appropriately remedy the condition brought on by his use of the lease." Thus, in Louisiana, although his mineral interest carries with it the right to use the surface, the lessee is bound to restore the surface.

As mentioned before many of the problems related to surface use have been made moot by the current lease forms. Oddly enough, the lease forms which are almost universally prepared by the lessees now contain specific clauses whereby the lessee assumes liability for various

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[17]Matheson v. Placid Oil Co., 212 La. 807, 33 So. 2d 527 (1947).

[18]La. Civil Code Ann., art. 2720 provides that if there has been no inventory of the property leased, the lessee is presumed to have received it in good condition and must return it in the same condition, allowing for necessary wear and tear and unavoidable accidents. It might appear that the allowance for wear and tear excepts from this provision the duty to fill pits and restore crops necessarily destroyed, but this is not the interpretation that has been applied by the court.

[19]Smith v. Schuster, 66 So. 2d 430, 2 O. & G.R. 127 (La. App. 1953). For an excellent discussion of this problem in Louisiana see Phillips, *Damages*, Fourth Annual Institute on Mineral Law 16 (Daggett 1956).

types of injury to the surface estate. Apparently, the oil companies have found it advantageous from a public relations standpoint to assume such responsibility and make more explicit the use to which they intend to put the surface.

The typical lease form in use today provides that the lessee shall have the right to use the land for "laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees." The typical form also provides that the lessee shall have free use of oil, gas, coal, wood and water from the the land but excepts water from the lessor's wells. Usually there is contained a provision that the lessee shall have exclusive right to maintain pits, reservoirs, pickup stations and plants and that the lessee shall have all necessary and useful rights of way, easements and servitudes.[20]

But the forms do not simply provide benefits for the lessee. On the contrary, the companies now generally provide that they will pay damages for crops and timber destroyed due to their operations,[21] that they will upon request by the lessor bury all pipe lines below ordinary plow depth, that no well shall be drilled within a specified distance of any residence or barn standing at the time of the execution of the lease and often that the lessee will restore the premises to their condition at the time of the lease. Experience has shown many operators that the cost of restoration, burying lines and paying for crops is much less costly than are hostile attitudes in the area of development.

IV. Special Problems Related to Property Rights

Having set forth the general rules regarding the relationship, it is now appropriate to consider some special problems that occur most frequently: the right of the lessee to build upon the premises and to sublease for building purposes, the rights and obligations with regard to rights of way as well as the problems arising between the mineral lessee and agricultural lessees.

The rights of ingress and egress are implied from the lease in favor of the lessee or mineral owner just as is the right to use the surface in any other way necessary to the subjugation of the mineral.[22] This right includes the right to build and to maintain such roads and ways as are

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[20]The "typical" lease form is made up of a sampling of "Producers' 88" forms as set out in 7 Summers, Oil and Gas §§ 1115-1321.1 (Supp. 1959). The forms utilized vary from state to state, but there is a great deal of consistency in the characteristics under discussion.

[21]Grasses used for grazing purposes have been held not to constitute "crops" under this provision, Wohlford v. American Gas Production Co., 218 F.2d 213, 4 O. & G.R. 448 (5th Cir. 1955). See generally Brown, Oil and Gas Leases § 10.04 (1st ed. 1958).

[22]See, *e.g.*, Marlin v. Dale, 180 Ark. 321, 21 S.W.2d 428 (1929); Anderson v. Butler,

necessary to the operation of the mineral venture. It has been held that even where the operator finds it necessary to oil the surface of the road, thereby making it valueless for agricultural purposes for many years, in the absence of any agreement to the contrary the surface owner cannot recover from the mineral operator.[23] The right is one of necessity and not one of convenience and is not to be used with disregard for the rights of the surface owner.[24] That is to say, that if two routes are available, one of which would substantially hinder the surface holder, the other must be used. One who builds a road is responsible for the maintenance of cattle gaps in order to prevent the cattle of the surface holder from escaping and damaging crops,[25] but it has been held that the surface holder's servient interest cannot interfere with the right of the mineral operator to place his rights of way wherever necessary for his operations, nor can the mineral operator be compelled to build new roads to service new wells rather than extend old roads. Further, he cannot be required to build roads only at places indicated by the surface holder unless it is shown that to do otherwise would be an unreasonable use by the mineral operator.[26] The right to build necessary roads and ways includes with it the right to build such pipelines as are necessary to the operation and production.[27]

The mineral operator also has the right to build any necessary structures for the maintenance and protection of the wells.[28] Considering this right the courts have been careful to distinguish between those cases in which the building of houses for employees were necessary to the protection and operation of the well and those that go beyond this use. It seems that having strangers dwelling upon the land is especially

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203 Miss. 512, 35 So. 2d, 709 (1948); Mid-Continent Petroleum Corp. v. Donelson, 189 Okla. 273, 116 P.2d 721 (1941); Cozart v. Crenshaw, 299 S.W. 499 (Tex. Civ. App. 1927) (a subsequent surface lessee could not build a refinery so as to interfere with the mineral lessee's right of ingress and egress); Squires v. Lafferty, 95 W. Va. 307, 121 S.E. 90 (1924).

[23]Mid-Continent Petroleum Corp. v. Donelson, *supra* note 22.

[24]Marlin v. Dale, 180 Ark. 321, 21 S.W.2d 428 (1929).

[25]Republic Natural Gas Co. v. Melson, 274 P.2d 543, 4 O. & G.R. 57 (Okla. 1954).

[26]Gulf Oil Corp. v. Walton, 317 S.W.2d 260, 10 O. & G.R. 84 (Tex. Civ. App. 1958).

[27]*E.g.*, Livingston v. Indian Territory Illuminating Co., 91 F.2d 833 (10th Cir. 1937); Kentucky-West Virginia Gas Co. v. Crum, 258 Ky. 508, 80 S.W.2d 537 (1935); Rennie v. Red Star Oil Co., 78 Okla. 208, 190 Pac. 391 (1920); Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936), *affirming* 62 S.W.2d 491 (Tex. Civ. App. 1933); King v. South Penn Oil Co., 110 W. Va. 107, 157 S.E. 82 (1931).

[28]*E.g.*, Livingston v. Indian Territory Illuminating Oil Co., *supra* note 27; Joyner v. R. H. Dearing & Son, 134 S.W.2d 757 (Tex. Civ. App. 1939) (buildings may be constructed which are "necessary to safeguard against loss to lessee by fire or theft"); Turner v. Big Lake Oil Co., *supra* note 27; Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923); Holbrook v. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798, 4 O. & G.R. 453 (1955).

distasteful to the surface owner. On the other hand, it is often necessary, especially in isolated areas, that the operator provide housing on the location for crews or pumpers. Often where there are several wells upon the premises or in the area, field warehouses are of great convenience.

Illustrative of the cases holding that the operator went beyond his rights in this respect is the old but oft-cited case of *Fowler v. Delaplain.*[29] In that case the lessee's employee was in possession of the property on which he had erected a house, barns and other structures and was farming the land. The Ohio court held that the right to use so much of the surface as is necessary included the right to build tanks, station machinery, and place pipes and the like upon the land but did not extend the authority to the operator to sublease to his employees any of the surface for barns, residences, yards, gardens or pastures. This case is still followed, but where it is necessary to operation of the mineral endeavors. the operator may provide housing for his employees upon the premises.

In *Holbrook v. Continental Oil Company*[30] the Wyoming court held that the erection of three dwelling houses for employees was a reasonable use of the surface by the mineral operator. In that case the dwellings upon the premises were necessitated by the fact that there were numerous wells upon the leasehold as well as tank batteries and separators. The employees worked around the clock on eight hour shifts. Probably the most important factor in the decision was the distance from the leased premises to the nearest town, a distance of forty-five miles. If any rule may be drawn from the cases, it is that the mineral operator may build such structures as are necessary to protect his interest and operations, and if any special circumstances make it necessary to have employees dwelling upon the premises the operator may provide for this. But in no event may the land be used by the employee for farming or pasture or any other purposes not related to the mineral venture.

The use of the surface by the mineral operator is limited to use for the production of the minerals under the surface and does not, in the absence of special agreement such as a pooling provision in the lease, extend to production from beneath other land.[31] This means that the operator may not drill directionally from his lessor's land into deposits in which the lessor has no interest and from the development of which the lessor derives no benefit.[32] Nor may the operator place pumps

[29]79 Ohio St. 279, 87 N.E. 260 (1900).

[30]73 Wyo. 321, 278 P.2d 798 (1955).

[31]Russell v. The Texas Co., 238 F.2d 636, 8 O. & G.R. 221 (9th Cir. 1956), *cert. denied* 354 U.S. 938 (1956); Mid-Texas Petroleum Co. v. Colcord, 235 S.W. 710 (Tex. Civ. App. 1921).

[32]See Granz Corp. v. Fifer, 295 Fed. 106 (9th Cir. 1924) wherein lessee put pumping station on land of lessor to supply water to another well on other land; Axis Petroleum Co. v. Taylor, 42 Cal. App. 2d 389, 108 P.2d 978 (1941) wherein lessee allowed third party conducting operations on adjoining land to place its boiler used

or other machinery, which is being used in the production of minerals from another lease, upon the land of one who is not therein involved.

When the surface owner leases to a third party for agricultural purposes, a new relationship is created. In such a situation it is very important to note whether the agricultural lease was created before or after the mineral lease. The writers seem to agree that an agricultural lessee who took prior to the execution of the mineral lease is in a position superior to that of the mineral lessor and the subsequent agricultural lessee. For while a subsequent agricultural lessee takes with knowledge of the pre-existing right of the mineral operator and while the lessor has granted the right of reasonable use, the prior agricultural lessee takes with no notice of the rights of a mineral operator.[33] Further, since the lessor has already demised the right to use the surface to the agricultural lessee he cannot again demise it to the mineral operator as it is not then his to grant. This is essentially the position of *Republic Natural Gas Company v. Melson*,[34] In which the Oklahoma court held the mineral lessee liable for damages to the interest of the agricultural tenant although no negligence was shown. There the court said that the mineral lessee was under a duty so to use the surface as not to injure the interest of the agricultural lessee. This would appear to make the mineral lessee absolutely liable for all damages to the agricultural tenant's interest. Dean Keeton went so far as to say in a recent issue of the *Texas Law Review* that the mineral lessee cannot *without permission* interfere in any way with the possession and use of the surface by the agricultural lessee.[35] However, the article cites no authority on this point, and it seems that no court has yet enjoined the operator from drilling without the agricultural lessee's permission on land held by an agricultural lessee.

A difficult problem arises where the minerals are severed and an agricultural lease is made prior to the execution of a mineral lease. Such was the case in *Mid-Continent Petroleum Corporation v. Rhodes*[36] where the Osage Indians had reserved the minerals before granting the

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in connection with such operations upon the land of lessor, and used gas from the lease in operation of wells on other property (dictum). These cases support the view that such acts constitute a breach of covenant which is to be answered in damages rather than cancellation of the lease.

[33]BROWN, OIL AND GAS LEASES, § 10.04 (1st ed. 1958). See generally Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1 (1956); *But see* discussion note, 1 O. & G.R. 125 in which the annotator found no cases where a private owner had first executed an agricultural lease, but submitted that a better rule would be that the lessor impliedly reserved use of the surface for mineral exploration.

[34]274 P.2d 543, 4 O. & G.R. 57 (Okla. 1954).

[35]Keeton and Jones, *supra* note 33, at 5.

[36]274 P.2d 543 (Okla. 1956).

land to the United States. The court held that the agricultural tenant of the United States could not in the absence of a showing of negligence recover for injury to cattle on the part of the mineral lessee. There the court reasoned that the agricultural tenant took with the knowledge that the Osages owned an estate in the land for the purpose of exploring for oil and gas and possessed exclusive rights to use so much of the leased premises as was reasonably necessary for such operations. This view has been expressed also where the government was not involved.[37] The reasoning seems to be sound and consistent with the concept of superiority of rights being based upon what the lessor has to grant at the time of the demise. If the lessor has conveyed the mineral rights, or if he has never owned them he should not be able to interfere with the rights of the party holding such rights by a demise of the surface interest.

Since Mississippi has held consistently that a reservation of minerals reserves the right to use the surface in any manner necessary to production of the minerals, it should follow that the operator or lessee, like the mineral owner, is not liable for necessary surface damage to an agricultural lessee who takes after the severance of the surface and the minerals.[38]

In accord with the same reasoning which makes the mineral lessee absolutely liable to the prior agricultural tenant he is liable to the subsequent agricultural tenant only to the extent that the damage results from negligence or misuse.[39] The reasoning, that the owner cannot demise that with which he has already parted, leads to the conclusion that once the mineral lease is granted and thus the reasonable use of the surface is also granted, the lessee cannot thereafter convey or

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[37]Stanolind Oil & Gas Co. v. Wimberly, 181 S.W.2d 942 (Tex. Civ. App. 1944).

[38]In Pace v. State, 191 Miss. 780, 4 So. 2d 270 (1941), the court held that the mineral lessee of the state was not liable for damages to the prior agricultural lessee since the agricultural lease reserved the minerals. Relying on that case, in McNeese v. Renner, 197 Miss. 203, 21 So. 2d 7 (1944), the court said that a mineral owner who takes from one who previously had owned the entire fee has the right of necessary surface user and is not liable to a surface owner who took at the time of the severance. From this position it seems an easy logical step to the position that the lessee of mineral rights severed prior to or at the time of a grant of a surface lease is not liable for damages to the surface lessee's interest in the absence of negligence.

[39]See Gulf Oil Corp. v. Whitaker, 257 F.2d 157, 9 O. & G.R. 543 (5th Cir. 1958); Vodopija v. Gulf Refining Co., 198 F.2d 344, 1 O. & G.R. 1210 (5th Cir. 1952); Benefiel v. Pure Oil Co., 322 Ill. App. 5, 53 N.E.2d 726 (1944); Wellsville Oil Co. v. Carver, 206 Okla. 181, 242 P.2d 151, 1 O. & G.R. 456 (1952); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410, 3 O. & G.R. 1556 (1954); Chapapas v. Delhi-Taylor Oil Corp., 323 S.W.2d 64, 10 O. & G.R. 813 (Tex. Civ. App. 1959); McCarty v. White, 314 S.W.2d 155, 9 O.& G.R. 386 (Tex. Civ. App. 1958); Placid Oil Co. v. Lee, 243 S.W.2d 860, 1 O. & G.R. 191 (Tex. Civ. App. 1951). See generally BROWN, OIL AND GAS LEASES § 10.04 (1st ed. 1958); Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1 (1956-57).

demise any right to another which interferes with the prior grant. The only right which he can thereafter grant is that which he still has. Therefore, the subsequent agricultural tenant stands in the shoes of the lessor and can recover only where the harm is the result of some wrongful or negligent use.

The same rule applies to a subsequent purchaser of the land, since he too takes subject to the rights of the mineral operator. In *Wilcox Oil Company v. Lawson*[40] the Oklahoma court stated the law as follows:

> The holder of a valid oil and gas lease has the right and privilege to go on the land and do all those things necessary and incidental to the drilling of wells, including the right to the use of the surface and in the absence of a provision that lessee would be liable for growing crops, *the only basis for recovery of damages is proof of wanton or negligent destruction, or that damages were to portion of the land not reasonably necessary for oil and gas development.* (Emphasis added.)

In *Cities Service Oil Company v. Dacus*[41] the Oklahoma court specifically applied this language by quotation to a case brought by a subsequent purchaser of the land.

Interesting problems also arise out of the operation of seismographic and geophysical operations upon the land. Only two of these problems are within the scope of this comment: the liability for unauthorized trespass to the surface, and the consequences of surface damage caused by seismographic explosions. When one goes upon the property of another without permission and explores the premises without the consent of the owner, he is liable as a trespasser for all damages which the property sustains due to such trespass.[42] Where one has permission to enter the land and conduct geophysical tests upon the express conditions that tests should not be made within a given area around the land owner's house and well, it has been held by the Mississippi Supreme Court that the defendant is liable for damage to the well if he violated the condition.[43] The liability rests upon the theory that by the violation of the condition the defendant became a trespasser *ab initio;* therefore, the absence of negligence did not preclude recovery. The party who enters under permission takes the position of a trespasser upon violation of a restriction as to the area of exploration. This view is analogous to and consistent with the view that one who conducts drilling operations and occupies more of the land than is reasonably necessary is liable for damages with no consideration of negligence. It would be a harsh rule which would allow one to set off seismic explosions in a prohibited area

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40341 P.2d 591, 10 O. & G.R. 991 (Okla. 1959).

41325 P.2d 1035, 9 O. & G.R. 206 (Okla. 1958); *accord,* Parker v. The Texas Co., 326 S.W.2d 579, 11 O. & G.R. 293 (Tex. Civ. App. 1959).

42See 4 SUMMERS, OIL AND GAS § 661 (perm. ed. 1938).

43General Geophysical Co. v. Brown, 205 Miss. 189, 38 So. 2d 703 (1949).

and defend on the ground that he conducted the activity as a reasonable man, using no more explosives than prudence would dictate for the success of the exploration. Although the relation between the mineral operator and those owning land adjoining the premises of operation is outside the scope of this comment, it should be mentioned here that there is a great split of authority concerning damages to adjoining property caused by seismographic explosions. The difficulty lies in determining whether the doctrine of *Rylands v. Fletcher*[44] will be followed, thereby giving rise to a cause of action based upon strict liability without a showing of negligence. The majority of jurisdictions hold that there is absolute liability based upon the inherently dangerous activities concept.[45] In *General Geophysical Company v. Brown*[46] the court decided the question there on the basis of excessive user and trespass *ab initio,* which would not apply where the plaintiff does not own the property involved in the exploration. However, in *Central Exploration Co. v. Gray*[47] the Mississippi Supreme Court was faced squarely with the problem and chose to follow the doctrine of *Rylands v. Fletcher* imposing liability for any damage resulting from dangerous activities upon the party carrying on such activity rather than upon the innocent adjoining land owner who does not profit from the activity causing the damage.

V. Conclusion

Having looked at the specific problems arising from use of the surface by the mineral operator, we are now in a better position to examine Professor Summer's statement that the rights and liabilities of the operator are governed by the ordinary rules of property and tort law. It has been indicated that many of these relationships grow out of a consideration of the implications to be drawn from the contract between the lessor and lessee and between the grantor and grantee. The courts have also described the interest of the operator in the surface as an easement. They have become involved in the problems of the doctrine of *Rylands v. Fletcher.* Thus, although the peculiar factual situations often shadow the ordinary law, in the light of analysis it is clear that there is little that is really new from a legal or analytical standpoint in these cases. Where the jurisdictions are split on an issue, it is

44[1866] 1 Ex. 265, *aff'd* 3 H.L. 330 (1868).

45For an excellent full length discussion of this problem see 4 Summers, Oil and Gas § 661 (perm. ed. 1938) in which the author indicates that California, Illinois, Montana, Tennessee, Rhode Island, Ohio, Washington, Iowa, Missouri, Oklahoma and South Dakota follow the strict liability rule while New York, New Jersey, Massachusetts, Alabama, Kentucky and Kansas require a showing of negligence.

46205 Miss. 189, 38 So. 2d 703 (1949).

47219 Miss. 757, 70 So. 2d 33, 3 O. & G.R. 315 (1954).

usually because they are split upon the ordinary law, for example, the problem of strict liability. The primary questions are whether the grantor had that which is alleged to have been granted as in the prior-subsequent lessee situations and whether the right contested is one which is reasonably incident to the mineral interest.

J. E. Pool

RECENT DECISIONS

Constitutional Law—First and Fourteenth Amendments—Separation of Church and State

In an action of ejectment by the American faction of the Russian Orthodox Church to recover possession of Saint Nicholas Cathedral, the New York Court of Appeals directed judgment for the plaintiff on grounds that the occupant of the Cathedral, as appointee of the Patriarch of Moscow, was under domination of secular authority in the U. S. R. R. and so had no right to possession under state common law. *Held*: Reversed. The question of who is entitled to the use and occupancy of Saint Nicholas Cathedral is to be decided by an ecclesiastical tribunal rather than a civil court. *Kreshik v. Saint Nicholas Cathedral*, 80 Sup. Ct. 1037 (1960).

"[W]henever questions of discipline ... faith ... ecclesiastical rule, custom, or law have been decided by the highest of the church judicatories ... the legal tribunals must accept such decisions as final and binding ...."[1] Although this statement by the Supreme Court in 1871 has been the rule in most jurisdictions,[2] a few states have not followed it.[3] The minority agreed that civil courts should not interfere in ecclesiastical disputes unless property rights were involved,[4] but totally rejected the authority of ecclesiastical adjudication regarding property rights,[5] which the majority said was not only binding, but beyond the jurisdiction of civil courts to question[6] because of the court's incompetence to decide technical questions of religious dogma.[7]

The New York legislature in 1945, enacted a statute recognizing the authority of the American schismatic group of the Russian Orthodox Church to control all of the Church's property in New York.[8] It was, however, adjudged unconstitutional in *Kedroff v. St. Nicholas Cathedral*.[9] Mr. Justice Reed, writing for the majority, held the statute in violation of the First Amendment as applied to the states by the Fourteenth, and Mr. Justice Frankfurter concurred on the basis that since possession and title to the Cathedral were at stake, a religious issue was raised. Mr. Justice Jackson, in the only dissent, argued that the case was within the Court's jurisdiction because possession of the Cathedral was a property issue and incapable of being settled by canon law.[10] Thus the court decided that property of a hierarchical church was to be disposed of in accordance with the will of its hierarchy, regardless of schisms or groups within the church who would have otherwise. When, therefore, the instant case came before the Court with basically the same facts as

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[1]Watson v. Jones, 80 U. S. (13 Wall.) 666 (1871).

[2]Mack v. Kime, 129 Ga. 1, 22, 58 S. E. 184, 193 (1907).

[3]Watson v. Gavin, 54 Mo. 353 (1873).

[4]See, *e.g.*, Watson v. Avery, 2 Bush. 332 (Ky. 1868).

[5]See Watson v. Gavin, 54 Mo. 353 (1873).

[6]See, *e.g.*, Watson v. Avery, 2 Bush 332 (Ky. 1868).

[7]See Watson v. Jones, 80 U.S. (13 Wall.) 666 (1871).

[8]N.Y. Religious Corp. Law §§ 105-08 (1945).

[9]344 U. S. 93 (1952).

[10]*Id.* at 126 (dissenting opinion).

Kedroff, except that judicial relief was sought where legislation had failed,the Court applied the *Kedroff* decision *in toto*.[11]

It should not be assumed that the Court has laid down an inflexible rule, for should it become apparent that the Patriarchate in Moscow was using the American Archdiocese for communist subversion, there exists little doubt that the Court would consider this a danger that the state might properly control.[12] The decisions in *Kedroff* and *Kreshik* suggest a doubt about the validity of the Mississippi Church Property Act,[13] which provides for the discharge of existing church trustees by the chancery court should the majority of the "local beneficiaries" find an "irreconcilable hostility or tension".[14] The chancery court would then appoint another group of trustees from among the local beneficiaries. These trustees have complete authority over all church property, real and personal, and "temporalities appurtenant" thereto. Such action would seem to give to civil courts the very power which the noted case prohibits.

John H. Cheatham, III

CONSTITIONAL LAW — SELF-INCRIMINATION — USE OF THE PRIVILEGE IN DISBARMENT PROCEEDING

A New York attorney, charged with participation in unlawful and unethical practice in negligence cases, was called before a judicial inquiry ordered by the New York Supreme Court, Appellate Division, Second Department. At the hearing the attorney refused to answer questions or produce records on the ground of possible self-incrimination, although he was warned that insistence on the privilege might lead to disciplinary action. As a result of the inquiry, disciplinary proceedings were instituted and the attorney was disbarred. HELD: Affirmed. An attorney who refuses to cooperate with the court and in good faith asserts his privilege against self-incrimination when asked questions relevant to the inquiry must be disbarred because the attorney has breached his duty to be candid and frank with the court. *In re Cohen*, 7 N.Y.2d 488, 166 N.E. 2d 672, 199 N.Y.S.2d 659 (1960), *cert. granted*, 363 U.S. 810 (1960).

There is no doubt that courts have the authority and the duty to exercise control over attorneys[1] and the right to order an inquiry into alleged unethical and unlawful practices.[2] The corresponding duty of

[11]See Kreshik v. St. Nicholas Cathedral, 80 Sup. Ct. 1037 (1960).

[12]See, *e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382 (1950). The Government's interest in protecting interstate commerce from subversive activities was held sufficient to warrant legislative restriction of a First Amendment right.

[13]Miss Laws, S.B. 1619 (1960).

[14]*Id.*

[1]*E.g.*, People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

[2]*E.g.*, *In re* Grae, 258 App. Div. 576, 17 N.Y.S. 2d 822, *rev'd*, 282 N.Y. 428, 26 N.E. 2d 963 (1940); *In re* Ellis, 258 App. Div. 558, 17 N.Y.S.2d 800 (1940), *rev'd*, 282 N.Y. 435, 26 N.E.2d 967 (1940).

the attorney is to cooperate with the court in the inquiry.[3] The question in the principal case was whether the court, in the use of that authority, remained within the limits of due process of law.[4] The Supreme Court has repeatedly held that, under due process guaranties of the Fourteenth Amendment, no inference of guilt may properly be drawn from the use of the Fifth Amendment privilege against self-incrimination.[5] In numerous cases, however, the release of a public employee has been sustained where the use of the privilege interfered with the purpose of an inquiry into fitness and reliability.[6]

The New York Supreme Court relied heavily on two cases[7] as authority for the proposition that an attorney may be disbarred for the use of the privilege against self-incrimination, both of which have been reversed by the New York Court of Appeals.[8] The court of appeals nevertheless affirmed, emphasizing the "key word . . . duty"[9] from the decisions concerning public employees that furnish apt analogies to the present case.[10] The court said: "As a lawyer he was 'an officer of the court, and, like the court itself, an instrument . . . of justice' with the enevitable consequences that the court which was charged with control and discpline of its officers had its own right . . . to strike his name from the rolls if he refused to cooperate."[11]

The determination of the conflict between the attorney's right of due process and his duty to cooperate with the court was resolved in the principal case in favor of the latter. When the attorney exercised the privilege of practicing before the court he necessarily assumed the corresponding duty of cooperation with the court. It is evident that the attoreny has the right exercise his privilege against self-incrimination as a citizen; however, in the exercise thereof, he must choose between his privilege and his duty to the court.[12] "Membership in the bar is a privilege burdened with conditions . . . . Whenever the condition is abused the privilege is lost."[13]

Lucien C. Gwin, Jr.

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[3]*In re* Vaughn, 189 Cal. 491, 209 Pac. 353 (1922).

[4]*In re* Cohen, 7 N.Y.2d 488, 166 N.E.2d 672, 199 N.Y.S.2d 658 (1960), *cert. granted*, 363 U.S. 810 (1960).

[5]*E.g.*, Slochower v. Board of Educ., 350 U. S. 551 (1955).

[6]Nelson v. County of Los Angeles, 362 U.S. 1 (1960) (social worker); Beilan v. Board of Educ., 357 U.S. 399 (1958) (Schoolteacher); Lerner v. Casey, 357 U.S. 468 (1958) (other public employees); Christal v. Police Comm., 33 Cal. App. 2d 564, 92 P.2d 416 (1939) (policeman). *Contra*, Slochower v. Board of Educ., 350 U.S. 551 (1955) (college professor); Sheiner v. State of Florida, 82 So. 2d 657 (1955) (lawyer). Compare *In re* The Integration Rule of The Florida Bar, 103 So. 2d 873 (1956).

[7]*In re* Grae, 258 App. Div. 576, 7 N.Y.S.2d 822 (1940); *In re* Ellis, 258 App. Div. 558, 17 N.Y.S.2d 800 (1940).

[8]*In re* Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940); *In re* Ellis, 282 N.Y. 435, 26 N.E. 2d 967 (1940) (on refusal to waive statutory immunity, not pleading self-incrimination).

[9]*In re* Cohen, 7 N.Y.2d 488, 496, 166 N.E.2d 672, 676, 199 N.Y.S.2d 658, 663 (1960).

[10]Cases cited note 6 *supra*.

[11]*In re* Cohen, 7 N.Y.2d 488, 495, 166 N.E.2d 672, 675, 199 N.Y.S.2d 658, 662 (1960).

[12]*In re* Cohen, 9 App. Div. 2d 436, 195 N.Y.S.2d 990 (1959).

[13]*In re* Rouss, 221 N.Y. 81, 116 N.E. 782 (1917).

CRIMINAL LAW — CRIMINAL RESPONSIBILITY OF FELON FOR HOMICIDE PERPETRATED BY STRANGER DURING COMMISSION OF FELONY

Defendant and companions became involved in an altercation with one Gray and his brother which resulted in the near-fatal shooting of Gray by defendant and a gun battle with an approaching police officer. During the attempted escape of defendant and an accomplice by automobile, a tavern owner came to the aid of the officer, and both fired at defendant and companion. Defendant's companion and a bystander were killed, and the proof showed that both shots came from the tavern owner's rifle. Defendant was indicted on two counts of murder. The Nassau County Court dismissed the indictments,[1] and the supreme court, appellate division, affirmed.[2] HELD: Affirmed. In order for a party to be guilty of felony murder, the act must be actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose. *People v. Wood*, 8 N.Y.2d 48, 167 N.E.2d 328, 201 N.Y.S.2d 736 (Ct. App. 1960).

At common law, the malicious intent to commit murder was implied as a matter of law in cases of homicide occurring while the defendant was engaged in the commission of some other felony. Such a killing, by operation of the "felony murder rule", was murder whether actually intended or not.[3] Since this concept has been limited to specific felonies in many states,[4] its severity, as it existed at common law, has been mitigated. When a person other than the felon or co-felon delivers the mortal blow or wound, there is a split of authority on the question of criminal responsibility of the felon or felons. One line of decisions applies the doctrine of proximate cause, with its test of foreseeability of injury, to determine criminal responsibility.[5] There is other authority for the view that the killing must be done by one who is a participant in the felony, and this view would not hold a felon criminally liable for the justifiable or excusable killing of another by a non-participant in the felony.[6] This line of authority seems to follow the often used rule of statutory construction that criminal statutes are to be strictly construed.[7]

In the principal case, the court held that the lethal acts of the tavern owner were "at least justifiable," and, in interpreting the New York statute,[8] limited the word "person" to the felon and accomplices. Such strict construction seems justified in light of prior New York decisions.[9] This was a case of first impression. In light of the fact that the

[1] 18 Misc. 2d 893, 186 N.Y.S.2d 141 (Nassau County Ct. 1959).

[2] 9 App. Div. 2d 433, 195 N.Y.S.2d 135 (App. Div. 1959).

[3] CLARK & MARSHALL, THE LAW OF CRIMES 587 (6th ed. 1958.)

[4] See generally Arent & MacDonald, *The Felony Murder and Its Application Under the New York Statutes*, 20 CORNELL L.Q. 288 (1935).

[5] See, *e.g.*, People v. Harrison, 1 Cal. Rptr. 414 (Dist. Ct. App. 1959).

[6] See, *e.g.*, Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

[7] See generally Pound, *Common Law and Legislation*, 21 HARV. L. REV. 382 (1908). For a criticism of the strict construction theory see Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 756-58 (1935).

[8] N.Y. PENAL CODE § 1044.

[9] See, *e.g.*, People v. Udwin, 254 N.Y. 255, 172 N.E. 432 (1910).

opinion examined both lines of authority in resolving the question, however, it is submitted that the principal case will be controlling in subsequent decisions.

The principal case seems to follow the modern trend of decisions[10] and may well cast some doubt on applicability of proximate cause in determining criminal responsibility in similar factual situations.[11] Even though the New York statute[12] does not limit the application of the felony murder rule to specific felonies, it is basically similar to other state statutes; consequently, the noted case may affect subsequent decisions from other states. The Mississippi statute,[13] which is more restricted in scope because it specifies certain felonies, has never been construed under a factual situation such as that in the principal case. Even though the Mississippi Supreme Court has held that among felons it is immaterial who strikes the fatal blow[14] it would be conjecture to predict what interpretation would be placed on the Mississippi statute. It is submitted that the decision in the principal case is sound. To apply the proximate cause test would seem to be "an unwarranted extension of the statutory mandate."[15]

Sam E. Scott

INCOME TAXATION — ATTORNEYS' FEES FOR SUCCESSFUL DEFENSE OF CRIMINAL TAX EVASION CHARGE — DEDUCTIBLE

A criminal indictment was returned against respondent and her husband for income tax evasion. The husband later entered a plea of *nolo contendere* to the charges, and the court dismissed the charges as to respondent. The tax court allowed the deduction for respondent's legal expense in the criminal action as a *business expense*. HELD: Affirmed on different grounds. Legal expenses incurred in the successful defense of a criminal tax charge are deductible as expenses incurred in the determination of individual tax liability.[1] *Commissioner v. Shapiro*, 278 F.2d 556 (7th Cir. 1960).

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[10]See, *e.g.*, State v. Garner, 238 La. 563, 115 So. 2d 855 (1959) (felon held not responsible).

[11]The court made the observation that Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958) had cast serious doubt on the proximate cause rationale of another Pennsylvania case, Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949), a leading case in which the court applied the proximate cause theory.

[12]N.Y. PENAL LAW § 1044.

[13]MISS. CODE ANN. §2215 (1942).

[14]Riley v. State, 208 Miss. 336, 44 So. 2d 455 (1950).

[15]People v. Wood, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (Ct. App. 1960).

[1]The court used the following sources: Int. Rev. Code of 1939, ch. 1, § 23(a)1, 53 Stat. 12 (now Int. Rev. Code of 1954, § 162): "Deductions from Gross Income. (1) Trade or business expenses. (A) . . . All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."
Int. Rev. Code of 1939, ch. 1, § 23 (a)2, 53 Stat. 12 (now Int. Rev. Code of 1954, §§

Legal expense for non-tax litigation is deductible as a business expense if the expense is directly connected with the operation of the business[2] and is "ordinary and necesary."[3] The same requirements are applied in cases where the deduction is claimed as a non-business expense for the production of income or for the maintenance and conservation of income-producing property.[4] In both situations the deduction is denied in non-tax cases where the legal expense is incurred in the *unsuccessful* defense of a criminal case.[5] The *Code* provides that legal expense for the determination of any tax is deductible if ordinary and necessary.[6] In civil suits the deduction has been allowed where the suit was for the recovery of an overpayment,[7] or for the purpose of contesting a deficiency successfully[8] or unsuccessfully.[9] The deduction has also been allowed for expense incurred prior to an indictment and conviction for criminal tax violations.[10]

Where the taxpayer is convicted of criminal tax evasion, the deduction is not allowed.[11] In the past the deduction has been allowed when the taxpayer was acquitted, but as a business expense.[12] Deductions have also been allowed where the suit giving rise to both criminal and civil liability was compromised.[13] The *Shapiro* case completed the picture by allowing a deduction for expenses incurred in successfully defending a criminal tax charge, not as a business expense, but as an expense incurred in the determination of individual tax liability.

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212 (1) and 212 (2)): "(2) Non-trade or non-business expenses. In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

Treas. Reg. 111, § 29.21 (a)-15 (1939), as amended, T.D. 5513, 1946-1 CUM. BULL. 61 (now Int. Rev. Code of 1954, § 212 (3)): In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable years . . . in connection with the determination, collection, or refund of any tax."

[2] *E.g.*, Kornhauser v. United States, 276 U.S. 145 (1928).

[3] See note 1 *supra*.

[4] See, *e.g.*, Trust of Bingham v. Commissioner, 325 U.S. 365 (1945).

[5] Estate of Albert E. MacCrowe v. Commissioner, 240 F.2d 841 (4th Cir. 1956); C. W. Thomas, 16 T.C. 1417 (1951). See also Commissioner v. Heininger, 320 U.S. 467 (1943) (dentist allowed to deduct expenses of unsuccessfully contesting fraud order) Louise S. Levy, 11 P-H Tax Ct. Mem. 665 (1942) (unsuccessful contest of disbarment not deductible).

[6] See Treas. Reg. 111, note 1 *supra*.

[7] *E.g.*, Williams v. McGowan, 152 F.2d 570 (2d Cir. 1945).

[8] *E.g.*, Norbert H. Wiesler, 6 T.C. 1148 (1946).

[9] *E.g.*, Trust of Bingham v. Commissioner, 325 U.S. 365 (1945).

[10] *E.g.*, Commissioner v. Schwartz, 232 F.2d 94 (1956); *cf.* Hopkins v. Commissioner, 271 F.2d 166 (6th Cir. 1959), *reversing and remanding* 30 T.C. 1015 (1958) with instructions to determine criminal and civil expenses.

[11] *E.g.*, Acker v. Commissioner, 258 F.2d 568 (6th Cir. 1958). *But see* Richard F. Smith, 31 T.C. 1 (1958) (acquitted of part of charge, deduction not allowed).

[12] Commissioner v. Peoples-Pittsburgh Trust Co., 60 F.2d 187 (3rd Cir. 1932). See also Charles M. Grace, 7 P-H Tax Ct. Mem. 750 (1938).

[13] Greene Motor Co. v. Commissioner, 5 T.C. 314 (1945).

Frequently, there is a thin line between criminal and civil tax fraud. When a taxpayer is acquitted of criminal tax fraud, by implication, he is guilty of no more than civil tax fraud. Since a deduction is allowed for the latter, a successful litigant in a criminal tax case should be afforded the same treatment.

Hollaman Martin Raney

INCOME TAXATION — DEPRECIATION — "USEFUL LIFE" AND "SALVAGE VALUE" DEFINED

For the taxable years 1950 and 1951 taxpayers employed depreciation practices in which the salvage value of automobiles used in their businesses was figured at zero, and the annual depreciation allowance was computed on the estimated physical life of the automobiles, even though they were disposed of before the end of the estimated physical life when they had substantial resale value. HELD: For federal income tax purposes the reasonable allowance for depreciation of automobiles used in taxpayers' businesses and sold when they had substantial resale value, was to be calculated over the estimated life of the automobile while actually employed by the taxpayers, applying a depreciation base of the cost of the property less resale value at the estimated time of disposal. *Massey Motors, Inc. v. United States*, 264 F.2d 552 (5th Cir.), *aff'd*, 80 Sup. Ct. 1411 (1960); *Commissioner v. Evans* 264 F.2d 502 (9th Cir.), *rev'd*, 80 Sup. Ct. 1411 (1960).

Neither the Internal Revenue Code nor the Treasury Regulations had defined "useful life" before the Regulations issued in 1956 gave certainty to the meaning of the term.[1] Still the question remained as to the meaning of the term prior to the 1954 Code and the Regulations promulgated thereunder. Beginning in 1919 the Regulations referred to "useful life of the property in the business,"[2] as did the Regulations of 1940.[3] A previous clause in the sentence indicates that the property to be depreciated is that which is "used in the trade or business."[4] The Regulations issued in 1942, which are applicable here, followed the wording of the earlier provision.[5] When the Internal Revenue Code of 1939 was amended to allow depreciation on property held for the production of income in addition to property used in the trade or business,[6] a change in wording was necessary in order for the Regulations to be consistent with the Code. The amendment to the Regulations deleted "property in the business" and substituted "depreciable property."[7] Tax-

[1]Treas. Reg. § 1.167 (a)—1 (b) (1956).

[2]Treas. Reg. 45, art. 165 (1919).

[3]Treas. Reg. 103, § 19.23 (l)—1 (1940).

[4]Treas. Reg. 45, art. 165 (1919).

[5]Treas. Reg. 111, § 29.23 (l)—1 (1942).

[6]Int. Rev. Code of 1939, § 23 (l), added by, ch. 619, § 121, 56 Stat. 819 (1942) (now INT. REV. CODE of 1954, § 167 (a)).

[7]Treas. Reg. 111, § 29.23 (l)—1 (1942), as amended, T.D. 5196, 1942—2 CUM. BULL. 100.

payers and the dissenting justices insist that this wording cannot be said to be conclusive of the meaning of "useful life," and thus the meaning of the term should be determined by the cases. The Commissioner and the majority of the Court are of the opinion that "useful life," notwithstanding the amendment, meant the same thing under the 1939 Code and the 1942 Regulations that it means under the 1954 Code and the 1956 Regulations, which makes it clear that depreciation is to be calculated over the period of useful life in the business rather than over the physical life. The cases, instead of clarifying the issue, inject considerable doubt, for the Commissioner in some instances seems to actively employ the physical life interpretation[8] and in others acquiesces in holdings in which the physical life interpretation is applied.[9] There are additional cases, however, in which the "useful life in the business" interpretation prevails.[10]

The "useful life" issue is considerably less important if salvage value is taken to mean resale value rather than zero. It is by figuring salvage value as zero that the physical life interpretation produces profit for the taxpayer. If salvage value is computed as resale value the taxpayer may deduct as depreciation only the difference between the cost and the amount realized on resale, and the variation tax-wise generally would not be appreciable whether the amount were written off over the average useful life or over the actual holding period. Salvage is not defined by the applicable Regulations, but the Regulations and the cases[11] indicate that salvage is resale value, not zero. The taxpayers and the dissenting justices contend that salvage value need be figured only when the taxpayer chooses to compute depreciation over the holding period, and if he depreciates the asset over its physical life salvage value is correctly junk. Perhaps the most influential factor in the Court's decision is the belief that the result obtained is in accordance with Congresional intent.[12]

The conflict appears to have arisen from the provision of the Code which permits capital gains treatment of profits resulting from the disposal of depreciable property.[13] The taxpayers took undue advantage of this provision and deliberately adapted their depreciation methods to systematically produce sizable profits. The Commissioner, wishing to curtail this practice and thereby plug another hole through which revenue escaped, enlisted the Court's aid and found sympathy.[14] While the wording of the Regulations seems to support the decision, many of the cases seem to oppose it. In practically all of these cases, however, it appears that the interpretation of the term "useful life" was of little practical consequence[15] and that expedience and compromise very likely were of more importance in producing the result than was considered judg-

[8]See, *e.g.*, Sanford Cotton Mills, 14 B.T.A. 1210 (1929).

[9]See, *e.g.*, Nat Lewis, 13 P-H Tax Ct. Mem. 1167 (1954).

[10]See, *e.g.*, L.A. Davidson, 22 P-H Tax Ct. Mem. 983 (1935).

[11]See, *e.g.*, Cohn v. United States, 259 F.2d 371 (6th Cir. 1958).

[12]Massey Motors, Inc., v. United States, 80 Sup. Ct. 1411, 1416 (1960).

[13]Int. Rev. Code of 1939, § 117 (j), added by, ch. 619, § 151, 56 Stat. 846 (1942), as amended, ch. 521, 65 Stat. 500 (1951) (now INT. REV. CODE of 1954, § 1231 (a)).

[14]Massey Motors, Inc. v. United States, 80 Sup. Ct. 1411, 1417 (1960)

[15]See, *e.g.*, General Securities Co., 11 P-H BTA-TC Mem. Dec. 547 (1942) (regardless of theory used the tax consequence is the same).

ment. The result may be justified as being equitable, but even so, the Court has come dangerously near condonation of legislation by administrative action and perhaps has ventured beyond.

John Robin Bradley, Jr.

REAL PROPERTY — INTENT OF GRANTOR WHEN DEED DELIVERED TO THIRD PARTY

Grantor executed a deed to real property to her son, reserving a life estate. The deed was delivered to a third person by the grantor "with no instructions whatsoever." The third party understood that the deed was to be kept in her safe deposit box, since the grantor did not have one. Four years later it was returned to the grantor upon her request. The deed was still in possession of the grantor at her death. The administrator of her estate attacked the validity of the deed on the ground of insufficient delivery. HELD: Reservation of a life estate in a deed delivered by the grantor to a third party is sufficient evidence of intent to pass immediate title to grantee. *Cole v. Hoefflin*, 354 P.2d 362 (Kan. 1960).

The delivery of a deed to a third person is all the delivery necessary to give effect to the deed, provided the grantor intends to divest himself completely of title by such delivery.[1] The matter of intention is the "polar star" in determining whether the delivery to the third person gave effect to the deed,[2] and the intention is to be determined by what the factual circumstances manifest.[3] Consideration of the circumstances, however, must be limited to those that existed at the time of delivery, and not extended to those arising subsequently.[4]

Where the grantor has given the third party instructions as to what to do with the deed, it is relatively easy for the courts to determine the grantor's intention.[5] But in cases where no instructions[6] or only instructions to "keep them safe" have been given, the courts have generally held the delivery to the third person ineffectual.[7] Authority exists, however, which supports the theory that retention of a life estate by the grantor in a deed delivered to a third person indicates an intent that the deed become presently effective.[8] An earlier Kansas case,[9] cited in the *Cole* opinion, applied this inference of intent from the reservation of a life estate, but in that case, as in similar cases from other jurisdictions,[10]

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[1]Van Huff v. Wagner, 315 Mo. App. 917, 287 S.W. 1038 (1926).

[2]Trask v. Trask, 90 Iowa 318, 57 N.W. 841 (1894).

[3]Hinson v. Byrd, 259 Ala. 459, 66 So. 2d 736 (1953).

[4]Johnson v. Cooper, 123 Kan. 487, 255 Pac. 1112 (1927).

[5]See Wilcox v. Hardisty, 60 Cal. App. 206, 212 Pac. 633. (1922)

[6]See Helper v. Connolley, 403 Ill. App. 358, 86 N.E. 226 (1949).

[7]See Deitz v. Deitz, 295 Ill. App. 552, 129 N.E. 508 (1920).

[8]Riegel v. Riegel, 243 Ill. App. 626, 90 N.E. 1108 (1910); Young v. McWilliams, 75 Kan. 243, 89 Pac. 12 (1907); Nuckols v. Stone, 120 Ky. 631, 87 S.W. 799 (1905).

[9]Young v. McWilliams, *supra* note 8.

[10]Riegel v. Riegel, 243 Ill. App. 626, 90 N.E. 1108 (1910); Nuckols v. Stone, 120 Ky. 631, 87 S.W. 799 (1905).

there was also evidence that the grantor made known his desire to have the deed delivered to the grantee upon his death.

In the *Cole* case there is no evidence that the grantor ever stated a desire that the deeds be delivered to the grantee upon her death or at any other time, and thus the only support for the court's finding that she intended the deed to become effective upon its delivery to her daughter was the fact that she had reserved a life estate. Granted, there is no apparent reason for the retention of the life estate if the grantor did not intend that the grantee receive title to the property *at some time* before her death, but it does seem questionable that this should be considered conclusive evidence of an intent to effect immediate delivery. Rather the reservation of the life estate, coupled with the delivery to the third party, seems to suggest an intention to the contrary. Normally, a grantor's delivery of a deed to a third party is meant to accomplish a delay in transfer of possession and /or record title to the grantee until the grantor's death. Here, however, this purpose had been accomplished already by the reservation of the life estate, so that delivery to the third party was only a futile act if this were the grantor's purpose. Delivery to a third party is also popularly used as a device to postpone transfer of title until the fulfillment of a condition, but there is no evidence of such a condition in this case. The other major purpose for such a delivery is to have the deed kept safely. There is evidence to indicate that the grantor sought to accomplish just such a purpose; if that is true, it would seem that an intent to pass immediate title was not present.

John C. Love, Jr.

REAL PROPERTY — THE TWO-DONEE STATUTE AND VALIDITY OF LIMITATIONS OVER

Testator devised real property to his eight children, and after them to their children. He further provided that if any of the eight children died without heirs of the body, his portion should descend to the others. One of the eight, Edward, conveyed his share of the property to defendant's predecessors and subsequently died without bodily heirs. Complainants, children of Edward's brother, seek to cancel as clouds upon their title the claims of defendants in the property. The chancellor sustained defendant's demurrer to the bill, holding the devise a violation of the two-donee statute in effect at the time. HELD: Reversed. Under the terms of the devise the remaindermen take in fee simple; the succession of donees does not exceed two; the statute is not violated, *Andv. Anderson*, 121 So. 2d 393 (Miss. 1960).

Mississippi's two-donee statute[1] has been the cause of a great number of apparently contradictory decisions. A most vexatious problem arises when the testator devises land to his children equally, with cross-remainders or executory limitations over to the children when one or more die without issue.[2] The Supreme Court of Mississippi has taken three

[1]Miss. Laws ch. 108, § 1, art. 3. (1856).

[2]Another problem is how the two-donee statute affects the common law rule against perpetuities in Mississippi. The court has alternately suggested that the two exist side by side, Shannon v. Riley, 153 Miss. 815, 121 So. 80 (1929), that the statute amends the common law, Redmond v. Redmond, 104 Miss. 512, 61 So. 552 (1913),

approaches to this problem. It has been held that the grantees take as a *class* for the life of the longest liver with remainder over in fee simple.[3] Such theory has no application to the present case, however, because the devise was made to named sons, and after them to their children. In other cases, where the will provided that the share of a devisee should descend to the survivors,[4] or those who might be living at the termination of the present estate,[5] or in some way indicated that survivorship was a condition precedent to sharing in the decedent's estate,[6] the court has held the limitation over a violation of the statute because it created a possible succession of donees in excess of two.[7] In reaching this conclusion, the court proceeds on the theory that upon the death of the grantee without issue the others would take a fee simple defeasible in his property with the same limitation of dying without issue.[8]

On the other hand the Mississippi court has twice ruled that the devisees took a fee simple defeasible[9] or a life estate[10] under the will, and that the remaindermen would take a fee simple, notwithstanding an express provision in the will that survivorship was a condition precedent to sharing in the property. These two decisions were based on the idea that the will showed nothing to indicate that the remaindermen were to take subject to the same restriction as that imposed upon the estate of the grantees. The theory of these cases lay unused for thirty-seven years until the principal case reached the court. Its revival would seem to suggest that the court, as presently constituted, prefers to give validity to the devise if possible,[11] and thereby satisfy the testator's wish concerning the ultimate disposition of his property. It follows that the remaindermen's fee simple interests would be descendible, and the court so held in the principal case, following what is apparently the rule in Mississippi[12] that any interest other than a naked possibility or expectancy is descendible.[13]

The principal case should go a long way toward clearing up some of the confusion surrounding our two-donee statute. While a discussion of the statute's merits would be purely academic, inasmuch as it was

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and that the statute is a substitute for the common law, Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737 (1937). Professor John Chipman Gray considered the statute as amendatory of the common law. GRAY, THE RULE AGAINST PERPETUITIES § 746 n.1 (4th ed. 1942).

[3]Redmond v. Redmond, *supra* note 2; Shannon v. Riley, *supra* note 2.

[4]*E.g.*, Smith v. Muse, 134 Miss. 827, 98 So. 436 (1924).

[5]Carter v. Sunray Mid-Continent Oil Co., 231 Miss. 8, 94 So. 2d 624 (1957).

[6]Nicholson v. Fields, 111 Miss. 639, 71 So. 900 (1916).

[7]*But see* Norfleet v. Norfleet, 151 Miss. 790, 119 So. 306 (1928). The words used in designating the other children are possibly the decisive factor in the application of this theory. See Anderson v. Anderson, 121 So. 393, 399 (Miss. 1960).

[8]*E.g.*, Hudson v. Gray, 58 Miss. 882 (1881).

[9]Armstrong v. Thomas, 112 Miss. 272, 72 So. 1006 (1916).

[10]Bullard v. Bullard, 132 Miss. 544, 97 So. 1 (1923).

[11]See Carter v. Sunray Mid-Continent Oil Co., 231 Miss. 8, 55, 94 So. 2d 624, 643 (1957) (dissenting opinion).

[12]See Hayes v. Cole, 221 Miss. 459, 73 So. 2d 258 (1954); Alexander v. Richardson, 106 Miss. 517, 64 So. 217 (1913).

[13]Anderson v. Anderson, 121 So. 2d 393, 400-01 (Miss. 1960).

amended in 1930[14] to remove the two-donee limitation, yet, causes of action under our "odd and confused" statute[15] are undoubtedly yet smouldering and will eventually flare up as litigation in which the two-donee limitation must be applied to the testator's words. The *Anderson* case did not overrule the decisions holding the limitation over invalid, but distinguished them on the words designating the remaindermen. The conclusion is inescapable that, for the present time at least, if the testator indicated that remaindermen must survive the decedent to share in his estate, they will take subject to the restriction of birth of issue and the limitation over is void. But if survivorship is not a condition precedent, the remaindermen will take in fee simple absolute and the remainders are descendible. This appears to be the better result,[16] for it allows the court to consider the testator's wishes without ignoring the statute. These same remainders that are descendible, however, may also be alienable,[17] in which case, though the devise be valid, the testator's intent may ultimately be frustrated.

William M. Champion

Wills — Adoption — Natural Child of Adopted Child Allowed to Contest Adoptive Parent's Will

The natural child of an adopted child filed objections to the will of the adoptive parent charging fraud and undue influence and lack of mental competence of testatrix. Held: For purposes of contesting the adoptive parent's will the contestant is an "interested party" under a recent amendment to the Michigan adoption statutes[1] declaring inheritance rights of adopted children identical with the rights of natural children. *In re Miner's Estate*, 359 *Mich.* 579, 103 N.W.2d 498 (1960).

Adoption was not recognized at common law;[2] consequently each state in the United States has its own adoption statute with its own judicial interpretation thereof. There have been marked differences in the interpretations of similar statutes.[3] For purposes of contesting a will the statutes usually provide that the contestant must be an "interested"[4]

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[14]Miss. Code Ann. § 2117 (1930) (now Miss. Code § 838 (1942)).

[15]Gray, *op. cit. supra* note, 2, § 746 n. 1.

[16]Where the testator declares that the remaindermen who will take may not be determined until some contingency occurs ("survivors"), one may wonder what other conditions are attached. But where the testator himself designates who will take as remaindermen upon the happening of an event ("others") there is no reason to suspect that he meant to include still further conditions.

[17]See Hayes v. Cole, 221 Miss. 459, 73 So. 2d 258 (1954); Alexander v. Richardson, 106 Miss. 517, 64 So. 217 (1913).

[1]See Mich. Stat. Ann. § 27.3178 (549) (1959).

[2]See Power v. Hafley, 55 Ky. 671, 4 S.W. 942 (1887).

[3]See 29 N.C.L. Rev. 227, 240 (1951).

[4]See, *e.g.*, Miss. Code Ann. § 503 (1942).

or an "aggrieved"[5] party.[6] The majority of the cases allow a child who outlives his adoptive parent to rightfully inherit from that parent.[7] However, in some states the courts refuse to confer these inheritance rights.[8] The problem turns on whether the courts wish to encourage adoption as a social institution or whether they wish to strictly adhere to the common law and alow inheritance only where there is a blood relationship.[9] With adoptions becoming more prevalent in the modern day the trend is toward the former.

The specific problem of this case has never been presented for determination in Mississippi. Prior to 1955 our adoption statute[10] did not confer per se any inheritance rights upon the adopted child.[11] In an attempt to correct the evils that arose under the old law,[12] Mississippi passed a new adoption statute[13] conferring inheritance rights similar to those granted in the Michigan adoption statute upon the adopted child.[14] The similarity in effect of these statutes, along with an examination of the Mississippi statutes on descent and distribution,[15] has convinced this writer that a result similar to that in the noted case could and shoud be reached in Mississippi.[16] This conclusion draws support from eminent Mississippi legal writers who have considered related problems[17] and, of course, from all who desire to promote adoption as a beneficial social institution.[18]

Donald K. Marcus

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[5]See, *e.g.*, MICH. STAT. ANN. § 27.3178 (36) (1943).

[6]See ATKINSON, WILLS 519 n.2 (2d ed. 1953).

[7]See, *e.g.*, *In re* Webb's Estate, 250 Pa. 179, 95 Atl. 419 (1915) (Child is representative based on word "heir" in adoption statutes); Vidal v. Commagere, 13 La. Ann. 516 (1858) (Civil law allows child to inherit as grandchild of adopter); Bernero v. Goodwin, 267 Mo. 434, 184 S.W. 74 (1916) (Inheritance based solely on construction of pertinent Missouri statutes).

[8]See, *e.g.*, Harle v. Harle, 109 Tex. 214, 204 S.W. 317 (1918) (Adopted heirs and their issue not considered as "children of deceased").

[9]See ATKINSON, WILLS 87 (2d ed. 1953).

[10]MISS. CODE ANN. § 1269 (1942).

[11]See Reeves v. Lowe, 213 Miss. 152, 56 So. 2d 475 (1952).

[12]See 27 MISS. L.J. 32 (1955).

[13]MISS. CODE ANN. § 1269-06 (1942).

[14]*Compare* MICH. STAT. ANN. § 27.3178 (549) (1956), *with* MISS. CODE ANN. § 1269-06 (1942).

[15]MISS. CODE ANN. §§ 467—479-11 (1942).

[16]*But see* Reeves v. Lowe, 213 Miss. 152, 56 So. 2d 475 (1952).

[17]See BUNKLEY & MORSE, AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI § 12.16 (1957); Robertshaw, *Mississippi's New Adoption Law*, 27 MISS. L.J. 32 (1955).

[18]See Kuhlmann, *Interstate Succession by and From the Adopted Child*, 28 WASH. U.L.Q. 221 (1943); Note, *The Problem of Descent and Distribution: A Need For Legislation*, 31 NOTRE DAME LAW. 451 (1956).

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Gibson B. Witherspoon
Attorney at Law
Meridian, Mississippi

OIL AND GAS LAW

(Creation and Transfer of Property Interests)

By Howard R. Williams and Charles J. Meyers, Professors of Law, Columbia University: Matthew Bender & Company, Inc., 1959. 2 vols. Pp. 1522. $50.00

The practitioner of oil and gas law can ill afford to be without this work. This writer keeps it within arm's reach for ready reference and finds it indispensable.

The two volumes which make up this work are the first of a series to be written by the authors dealing with the various aspects of oil and gas law. This initial treatise is a comprehensive study of the law pertaining to the creation and transfer of property interests in oil and gas.

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The magnitude of this treatise is impressive. It does not content itself with the mere plowing of old ground but opens up new ground. It treats certain aspects of the subject which appear to have been ignored by other authors. The approach of Professors Willams and Meyers, which goes beyond mere reporting and cataloguing, is refreshing. Decisions with which they take issue are boldly but carefully analyzed, and the authors leave no doubt as to why such decisions are considered unsound.

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The treatise which Professors Williams and Meyers have made available after many years of teaching and research is so complete and comprehensive that its merits cannot begin to be extolled in a brief review. A full appreciation can come only from its use by the practitioner of oil and gas law who is constantly examining titles, writing title opinions, preparing instruments which create or transfer interests, construing such instruments which others have prepared, and undertaking to determine the tax consequences of all such instruments. It is this writer's opinion that this is a work which will prove of lasting and incalculable value to the oil and gas lawyer and one that should be as handy as his Code.

Jack H. Ewing
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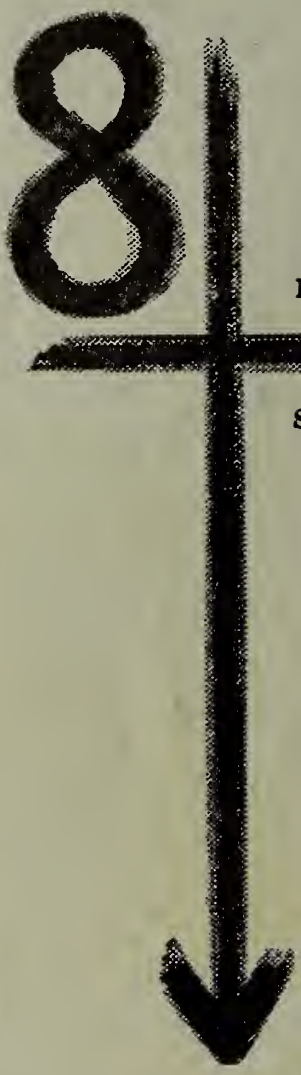

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